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No. _____

In the

Supreme Court of the United States

October Term, 1997

THOMAS DODD and DORIS DODD,
Petitioners,

v.

HOOD RIVER COUNTY, an Oregon municipal corporation, and the STATE OF OREGON, intervenor,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a regulatory taking case alleging denial of "economically viable use" of property, may a county avoid liability *as a matter of law* by merely showing that some residual value remained in the property?

2. In a regulatory taking case, is the determination of "reasonable investment-backed expectations" a factual question to be determined by the trier of fact or a question of law that can be determined by the appellate court in the first instance?

PARTIES TO THE PROCEEDING

The Petitioners are Thomas Dodd and Doris Dodd, husband and wife. There are no parent companies or wholly owned subsidiaries. The Respondent is Hood River County, an Oregon municipal corporation. The State of Oregon intervened in the action in support of Hood River County.

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PETITION FOR A WRIT OF CERTIORARI

Tom and Doris Dodd respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998). It is reproduced herein at Appendix (App.) A. The district court's opinion is unreported and is included herein at Appendix B. A prior Ninth Circuit decision in this case is reported at *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), and is reproduced at Appendix D.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on February 13, 1998. Thereafter, Petitioners sought rehearing and rehearing *en banc*. On April 2, 1998, the petition for rehearing with the suggestion for rehearing *en banc* was denied. Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Title 42, United States Code § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The subject matter of this action is the denial by Hood River County (County) of a permit to build one home on a vacant 40-acre parcel owned by Petitioners, Tom and Doris Dodd. In 1983, when the Dodds purchased the property for $33,300, the County's zoning allowed construction of a house. However, the zoning was subsequently changed. Under the new Forest (F-1) Zone, the Dodds were not permitted to build a home and were left with harvesting the timber as the only potential use.

The Dodds pursue a regulatory taking claim based on the Fifth and Fourteenth Amendments to the United States Constitution. First, they contend that harvesting the timber is not an "economically viable use" and, therefore, they have suffered a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

Second, even if there is not a denial of all economically viable use, the Dodds contend that under the ad hoc, factual inquiry of *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, they have suffered a taking. Under *Penn Central*'s ad hoc approach, factors identified by this Court as important for consideration are: (1) the economic impact on

the claimant, (2) the extent of interference with reasonable investment-backed expectations, and (3) the character of the government action.

This case was filed in the United States District Court for the District of Oregon. The statutory basis for jurisdiction of the district court is 28 U.S.C. § 1331 (civil actions arising under the Constitution of the United States).

A. Factual Background

The Dodds' property is located about 12 miles from the town of Hood River, Oregon. In 1983, the Dodds purchased the property for $33,300 to build their future retirement home.

At that time, the County's zoning allowed construction of a single-family dwelling on the property. This fact is admitted in Hood River County's answer to complaint.[1] Indeed, the county planning director testified before the planning commission that if the Dodds had applied for a building permit for a house in 1984, it probably would have been granted.[2] Other homes already existed on nearby parcels.[3]

For use *as a home site*, a real estate appraisal concluded that the Dodds' property had a 1983 value of $32,000.[4] The record contains no other formal appraisal of the land value in 1983.

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[1] Excerpt of Record submitted to Ninth Circuit (ER) Tab 12, Vol.1 (amended answer at 2:16-21).

[2] ER Tab 106, Volume 2 (Planning Commission Transcript at 18, Exhibit F to Declaration of John M. Groen (Groen Declaration)).

[3] ER Tab 53, Volume 1 (Declaration of Thomas Dodd (Dodd Declaration) at 2).

[4] ER Tab 54, Volume 1 (Real Estate Appraisal at 25, Exhibit A to Declaration of Richard M. Stephens (Stephens Declaration)).

Oregon adopted various statewide planning goals in 1974. Goal 4 stated in relevant part: "forest land shall be retained for the production of wood fiber and other forest uses.".[5] In February of 1983, the Land Use Board of Appeals (LUBA) for the State of Oregon ruled for the first time that under Goal 4 dwellings are not permitted in forest zones unless the dwelling is "necessary and accessory" to a forest use. *Lamb v. Lane County*, 7 Or. LUBA 137, 143 (1983). Because of that decision interpreting Goal 4, Hood River County began a process to amend its comprehensive plan and zoning to comply with this interpretation of Goal 4.

In late 1983 and early 1984 when the Dodds were purchasing their parcel,[6] the amendments proposed by the County to comply with Goal 4 did not preclude a dwelling on a *40-acre parcel* such as the one the Dodds were purchasing. Rather, the proposed changes required that only for *80-acre parcels*, any new dwelling must be shown to be "necessary and accessory" to a forest use.[7]

Consistent with these proposed amendments, on January 24, 1984, the Dodds received a "Land Use Compatibility Statement" issued by the Hood River County planning commission. The document identifies the Dodds as applicants for a "single family dwelling" and expressly states:

> Statement of Compatibility from Appropriate Land Use Authority. . . . We have reviewed the above

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[5] At D-3 quoting State Land Conservation and Development Commission Goal 4, Oregon Administrative Regulations 660-15-000(4).

[6] The parcel the Dodds purchased became legally partitioned, thereby allowing the sale to be completed, on January 24, 1984. App. at B-5.

[7] ER Tab 106, Volume 2 (*Hood River News*, December 14, 1983, Exhibit A to Groen Declaration).

> proposal and find it compatible with . . . statewide planning goals.[8]

Shortly thereafter, on February 21, 1984, through Ordinance No. 125, Hood River County adopted the proposed comprehensive plan and zone changes.[9] The ordinance specifically states that it is adopted "to comply with the requirements contained in Statewide Goals 1 through 14."[10] Under the new zoning restrictions, a house would be allowed in forest areas on 80-acre parcels only if the dwelling was "necessary and accessory" to a forest use. Dwellings on 40-acre parcels—such as the Dodds'—continued to be allowed without meeting the "necessary and accessory" test.[11]

Eight months later, on October 23, 1984, a letter was sent to Hood River County from the director of the Oregon Land Conservation and Development Commission. The letter directed the County to make further revisions to expand the application of the "necessary and accessory" test.

Accordingly, on December 17, 1984, the County passed Ordinance No. 133.[12] The additional amendments in Ordinance No. 133 required dwellings on 40-acre parcels—such as the Dodds—to also meet the "necessary and accessory" test. As set forth in the Hood River County planning director's decision denying the Dodds' land-use application:

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[8] ER Tab 53, Volume 1 (Land Use Compatibility Statement, Exhibit B to Dodd declaration).

[9] ER Tab 106, Volume 2 (Ordinance No. 125, Exhibit C to Groen Declaration).

[10] *Id.*

[11] *Id.*

[12] ER Tab 106, Volume 2 (Ordinance No. 133, Exhibit D to Groen Declaration).

> The words "necessary and accessory to a forest use" were adopted by the County for the Forest and Primary Forest Zones on December 17, 1984, as directed by the Land Conservation and Development Commission. *This action occurred approximately 13 months after the Dodds purchased the property.*[13]

The Dodds did not learn of the zoning changes until the summer of 1988. In that year, Tom Dodd retired from the United States Air Force, and he and his family moved from Houston, Texas, to Oregon with plans of building their home in Hood River County. It was then, in the summer of 1988, when they contacted the County planning department, that they learned for the first time of the zoning changes.[14]

In 1990, the Dodds filed applications for a land-use permit, a conditional use permit and, in the alternative, a zone and comprehensive plan change to once again allow a home on the property.

In support of their applications, the Dodds filed a forest inventory report prepared by Michael Dubrasich, a professional forester. He determined that 22 of the Dodds' 40 acres had a soil type called Bodell very cobbly loam. Dubrasich explained that this soil type "will not support forest vegetation" and, in fact, these 22 acres are not forested.[15]

The remaining 18 acres has a soil type called Ketchly loam, which will support forest vegetation. Of these remaining

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[13] ER Tab 54, Volume 1 (Findings of Fact at 26, Exhibit F to Stephens Declaration) (emphasis added).

[14] ER Tab 53, Volume 1 (Dodd Declaration at 2).

[15] ER Tab 58, Volume 1 (Forest Inventory at 3, Exhibit B to Declaration of Michael Dubrasich (Dubrasich Declaration)).

18 acres with this soil type, 12.6 acres are forested and the balance is covered with hazel brush.[16]

The Dodds' permit applications to build a house were denied by the County planning director on December 20, 1990. The planning commission affirmed the denials on March 31, 1991. On further appeal, the County board of commissioners reached a final decision affirming the denials on July 15, 1991.

B. The LUBA Decision

The Dodds next appealed the County's decision to LUBA. LUBA rejected all of the Dodds' various contentions including the Dodds' argument that the denial of a permit to build a house constituted a taking under the Oregon Constitution.[17] With respect to the taking claim, LUBA considered the evidence submitted in the record regarding the estimated value of a timber harvest. The Dodds' expert, Michael Dubrasich, concluded that the total net merchantable timber volume was 39,100 board feet. After deducting the expected costs of harvesting, he calculated the net value of the timber as $611.17.[18] In contrast to Dubrasich's conclusions, Kenneth Galloway, Hood River County forest manager, stated that if the Dodds cut the timber, after deducting costs, they would still have "$10,000 of profit."[19]

From review of this evidence, LUBA made the following finding:

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[16] *Id.*

[17] In all of the proceedings before LUBA and the Oregon state courts, the Dodds reserved their federal constitutional taking claim for resolution by the federal courts.

[18] ER Tab 58, Volume 1 (Forest Inventory at 9, Exhibit B to Dubrasich Declaration).

[19] ER Tab 54, Volume 1 (Galloway letter at 3, Exhibit J to Stephens Declaration).

> We conclude, based upon the above, that petitioners have not been denied a "substantial beneficial use of [their] property." It appears that the property has some limitations for forest use, but can produce a net profit if properly managed for timber production.

App. at C-7. Based on this finding, LUBA concluded that there was not a taking under the Oregon Constitution. That ruling was subsequently upheld by the Oregon Supreme Court. *Dodd v. Hood River County*, 317 Or. 172, 855 P.2d 608 (1993).

C. The District Court Decision

The Dodds filed their federal constitutional taking claim in federal district court on November 5, 1991. On January 21, 1993, the district court dismissed the federal taking claim on ripeness grounds. On appeal, the Ninth Circuit reversed the dismissal and found that the Dodds' federal taking case was ripe for review under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See Dodd v. Hood River County*, 59 F.3d at 858-61; App. at D-8-15. The Ninth Circuit remanded the case back to the district court.[20]

On remand, a jury trial was scheduled to commence on December 19, 1996. However, on December 11, 1996, the district court again granted summary judgment to the County. The district court reasoned that the factual issue governing the Oregon "substantial beneficial use" test was identical to the factual issue governing the federal "economically viable use" test. As stated by the district court:

> For either test, the underlying factual issue is identical: what is the value of the property after the regulation is in place?

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[20] The first Ninth Circuit decision also ruled that the Dodds' federal takings claim was not barred by res judicata. App. at D-16-18. The Dodds' substantive due process claim was rejected. *See* App. at D-21-22.

App. at B-13. The district court then viewed LUBA's finding of "net profit" as a determination that the market value of the property was $10,000. App. at B-16-17. In consideration of this market value, the district court found that the Dodds had not been deprived of all economically viable use but had suffered a mere diminution in value.

> The United States Supreme Court and the Ninth Circuit have denied takings claims for regulatory losses in value far greater than that the Dodds suffered here, from $33,000 to approximately $10,000.

App. at B-17. At that point, the district court's takings analysis ends. There was no consideration of the Dodds' second theory for a taking based on the ad hoc factors set forth in *Penn Central*, including interference with reasonable investment-backed expectations. In short, because there was "some value" remaining, there could be no taking. As the Ninth Circuit stated:

> The district court held that, because the Dodds had some value remaining in their land through forest use, they could not suffer a regulatory taking as a matter of federal law.

App. at A-13.

D. The Ninth Circuit Decision

The first question presented here is whether liability is avoided as a matter of law for a taking of economically viable use where the only determined fact is that the Dodds' property retained a permissible use that could yield $10,000 in value.[21]

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[21] The Dodds here do ***not*** challenge the factual finding of LUBA. Nor do they challenge the Ninth Circuit's decision to bind the Dodds to that finding. Rather, for purposes of seeking review by this Court, the Dodds accept the conclusion that, if harvested, the timber could yield $10,000.

The Ninth Circuit adopted an interpretation of the economically viable use test that focuses on remaining property value rather than on the viability of remaining uses. Like the district court, the Ninth Circuit stated that the "underlying factual issue" is "what is the value of the property after the regulation is in place?" App. at A-8; *see also id.* ("federal takings analysis of 'economically viable use' comports with LUBA's analysis"). Under that view of *Lucas*, the Ninth Circuit concluded there was no taking since the one-time act of harvesting the timber on the property would yield some value to the Dodds. *Id.* at 8-9.

The Ninth Circuit next considered remanding the case back to the district court for consideration of the Dodds' second theory for a taking—the ad hoc consideration of the *Penn Central* factors—and particularly whether the Dodds had a reasonable expectation of being able to build a house. App. at A-17. However, the panel decided this was an appropriate case for the appellate court to rule in the first instance "on the other takings factors which the district court did not address." App. at A-16. The panel confessed that in not allowing a remand, it was influenced by the fact that the Dodds had already pursued their case for many years. *Id.* Apparently, the Dodds' perseverance to bring their case to trial was viewed by the Ninth Circuit as an "overburden" on judicial resources. App. at A-19. Notwithstanding this basis for not allowing a remand on the *Penn Central* factors, the panel also stated the undisputed material facts were sufficient for the panel to resolve the *Penn Central* takings theory on its own. App. at A-16.

In addressing the *Penn Central* factors, the panel reasoned that because LUBA had rendered its decision in *Lamb v. Lane County* interpreting Goal 4, it was "untenable" for the Dodds to have any reasonable expectation of being able to build a house when they purchased the property in 1983. App. at A-17. In reaching this conclusion, the Ninth Circuit did not mention the Statement of Land Use Compatibility that the Dodds received.

Nor did the court mention Ordinance No. 133, adopted on February 21, 1984, one year after *Lamb* was decided, which continued to allow a house to be built on the Dodds' 40-acre parcel. *See* App. at A-17-18. Nor did the court mention that the Oregon State Legislature recently passed a law acknowledging that prior to 1985 it was not reasonable for property owners such as the Dodds to have known that restrictions were being put in place that would limit their ability to build a home. ORS 215.700. Based on that acknowledgment, on July 1, 1996, the County issued approval for the Dodds to establish a dwelling on their property.[22] This approval is pursuant to the new Oregon statute allowing homes on forest-zoned parcels which were purchased prior to 1985 and are shown (among other criteria) to be of poor commercial forest quality. *See* ORS 215.705, 215.720 (property purchased prior to 1985 and not capable of producing 5,000 cubic feet of timber growth per year).

Since the regulated use is now allowed, the Dodds' taking claim has now been converted from a permanent taking to a temporary taking. The measure of damages now sought by the Dodds is limited to temporary taking damages. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

The Ninth Circuit's decision means that the question of whether the Dodds had a reasonable investment-backed expectation to build a house is a question of law appropriately decided by the appellate court, even when the trial court has not ruled on the question. This holding conflicts with the relevant decisions from this Court as well as the holding in *Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, Supreme Court No. 97-1235 (1998), that this issue is a question of fact for the jury. *Id.* at 95 F.3d 1429-30.

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[22] ER Tab 106, Volume 2 (Findings of Fact at 23, Exhibit E to Groen Declaration).

The Dodds, therefore, raise two questions in this petition. First, whether the Ninth Circuit erred in ruling that under *Lucas*' economically viable use test, a county may avoid liability as a matter of law by merely showing that some residual value remained in the property? Second, whether the Ninth Circuit erred by deciding that the reasonableness of the Dodds' expectations presented a question of law rather than a question of fact to be determined by the trier of fact?

REASONS FOR GRANTING THE WRIT

I

REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT AND DIRECT CONFLICT BETWEEN THE CIRCUIT COURTS REGARDING THE "ECONOMICALLY VIABLE USE" TEST FOR A REGULATORY TAKING

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court set forth the "economically viable use" test as a cornerstone of regulatory takings law.

> The application of a general zoning law to a particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land.

Id. at 260.

Twelve years later, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, this Court clarified that whenever all economically viable use of property is denied, a regulatory taking is categorically established without need for further case-specific inquiry. *Id.* at 1015.

Since *Lucas* was decided, now over six years ago, the circuit courts have split widely on the methodology to be applied in determining whether remaining permissible uses are "economically viable." However, before setting forth the

conflicting approaches employed by the circuit courts, it is helpful to understand clearly the *Lucas* decision and the limitations of its discussion of the economic-viability test that have resulted in these conflicting approaches.

A. *Lucas* Necessarily Left Unanswered Critical Questions Regarding the Economic Viability Test That Now Vex the Circuit Courts

1. In Contrast to the Facts in This Case, *Lucas* Was Decided in a Setting Where the Trial Court Found That the Property Was "Rendered Valueless"

The question presented in *Lucas* was: "Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?" Brief of Petitioners on the Merits in *Lucas*, 505 U.S. 1003. In addressing this question, this Court considered whether the trial court's finding that the property was "rendered valueless" resulted in a taking under the economically viable use test. *Id.* at 1020. "This finding was the premise of the petition for certiorari." *Id.* at 1020 n.9.

Therefore, focusing on this factual finding, one interpretation of *Lucas* is that all economically viable use is denied only where the property is rendered valueless. Because of this finding, *Lucas* necessarily left unanswered whether there can be a denial of economically viable use when some residual value remains in the property.[23]

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[23] *See*, Laurie G. Ballenger, *A House Built on Sand: Lucas v. South Carolina Coastal Council*, 71 N.C. L. Rev. 928, 944 (1993).

> Because the *Agins* test of economic viability was clearly satisfied by the trial court's finding that the property had been rendered "valueless," the *Lucas* court did not have to explain the meaning of "economically beneficial or productive."

2. The *Lucas* Decision Is Unclear as to What Methodology Should Be Applied in Determining Whether a Particular Use Is Economically Viable

Lucas provides mixed signals as to how the "economic viability" of uses is to be determined. For example, *Lucas* at times appears to refer to the economic viability test as involving a consideration of the landowner's "loss of value." For example, in Footnote 8, the majority responded to Justice Stevens' criticism that the majority's decision allowed compensation *only* for property rendered valueless. The majority explained that an owner who does not suffer a "complete elimination of value" might not be able to claim a categorical taking but would, nevertheless, be able to pursue a taking under the *Penn Central* factors. *Lucas*, 505 U.S. at 1019 n.8.

Similarly, in Footnote 7, *Lucas* again appears to equate the methodology under the economic viability test as a measure of loss of value as well as the loss of use.

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the *loss of value* is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of *all economically beneficial use* of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas, 505 U.S. at 1016 n.7 (emphasis added).

In sharp contrast to these references to "loss of value," this Court repeatedly emphasized that economic viability of a use is measured by whether such use is economically productive, economically beneficial, economically feasible, or viable.

Lucas, 505 U.S. at 1016-19. *Lucas* stressed that "our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land." *Id.* at 1019 n.8. Repeatedly, the test was stated in terms that reflect that economic viability is *not* a diminution in value test *but is a use test*, focusing on whether the permissible uses are economically productive, beneficial, or viable. In a similar manner, this Court indicated that a categorical taking occurs when regulations render property "economically idle."

> [W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019.

In short, *Lucas* causes litigants and courts to consider whether there has been a denial of all "economically viable use." But does the methodology for this determination *require* a total loss of value as under the facts in *Lucas*? Can there be a denial of all economically viable use even with some residual value in the property because the permissible uses do not allow a fair or reasonable return to the owner?[24]

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[24] As one commentator stated:

> If the phrase "economically beneficial and productive" is different from "economically viable," does this mean that a property owner is no longer required to show that his property has absolutely no fair market value in order to take advantage of the Court's categorical rule? If "all economically beneficial and productive use" is not synonymous with fair market value, then what does the phrase "beneficial and productive" mean? Would a "beneficial and productive use" test harken back to the "reasonable return" language found in *Penn Central*?

(continued...)

There must be some standard by which a court can measure whether a use is "economically viable." But, as will be shown below, the circuit courts are sharply divided over the nature of that standard. As stated by William S. Walter:

> The Supreme Court's *Lucas* decision's *per se* takings rule has focused greater attention on the denial of all economically beneficial uses, suggesting methodological parameters for this takings factor that the courts may consider. . . . The *Lucas* decision portends a search by both the private and public sector sides of the takings issue for methodologies to define when a property is "economically idle" and denied all economically beneficial uses.

William S. Walter, *Appraisal Methods and Regulatory Takings: New Directions for Appraisers, Judges, and Economists*, 63 Appraisal J. 331, 340-41 (July 1995).

Justice Souter in *Lucas* explained the importance of addressing these issues in a subsequent case.

> The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that in light of our prior cases, the trial court's conclusion is highly questionable.
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> . . . .
>
> Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable)

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[24] (...continued)
Ballenger, *A House Built on Sand: Lucas v. South Carolina Coastal Council*, 71 N.C. L. Rev. at 944.

> taking on which it rest. . . . ***[T]he issue of what constitutes total deprivation deserves the Court's attention.***

Lucas, 505 U.S. at 1076-78 (Souter, separate statement) (emphasis added, citations omitted).

This case presents that opportunity. In contrast to the "rendered valueless" finding that defined the context of *Lucas*, this case asks whether liability can be established under the economic-viability test where it is conceded that some residual value remains in the property.

B. The Aftermath of *Lucas* Is a Significant and Sharp Conflict Among the Circuit Courts

In the 18 years since *Agins* was decided and the 6 years since the *Lucas* decision, the circuit courts have been unable to develop a consistent methodology for determining whether a permissible use of property is "economically viable."

To begin, the Ninth Circuit in *Dodd* considers the "economically viable use" test as a ***value*** test rather than a ***use*** test. As restated by the Ninth Circuit, the "underlying factual issue" for the economic viability test is, "what is the value of the property after the regulation is in place?" App. at A-8. The Ninth Circuit thus adopted the narrow view that if there is any use permitted that confers "some value" to the property, the economic viability test is satisfied.[25] This interpretation limits

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[25] The application of this rule to the Dodds meant that their taking claim was denied as a matter of law. In their case, they paid $33,300 for the property to use as a homesite. When a rezoning was subsequently instituted, the only permissible use was to harvest the trees—a use that would yield $10,000. Accordingly, there was *some value*, *some beneficial use* remaining to the Dodds. Although this represented at least a $23,300 loss to the Dodds, the residual value associated with cutting and selling their timber was a sufficient fact, standing alone, for the Ninth Circuit to dismiss the Dodds' taking

(continued...)

the scope of the *Lucas* rule only to those situations where—as in *Lucas*—the property is literally rendered valueless.[26]

Directly conflicting with the value-based methodology employed by the Ninth Circuit in *Dodd*, the Second Circuit utilizes a "marketable use" methodology. Under that test, the economic viability of a use is determined by

> whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use.

Park Avenue Tower Associates v. City of New York, 746 F.2d 135, 139 (2d Cir. 1984).

This marketable use methodology for determining economic viability was developed by the Second Circuit in part through a rejection of the "reasonable return" methodology. The plaintiffs in *Park Avenue* argued that under *Pennsylvania Coal Co. v. Mahon* and *Penn Central*, a remaining permissible use under new zoning restrictions is not economically viable where the "zoning change prevents investors from receiving a reasonable return on their investments." 746 F.2d at 138.[27] The Second Circuit expressly rejected the reasonable return measure of economic viability. *Id.*

> The crucial inquiry . . . is not whether the regulation permits plaintiffs to use the property in a "profitable"

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[25] (...continued)
claim as a matter of law. App. at A-8.

[26] *See also Alegria v. Keeney*, 687 A.2d 1249, 1253 (R.I. 1997) (rejecting taking because even though allowed uses represented a negative return, the owner retained value in the land).

[27] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (taking found where mining use was "commercially impractical"); *Penn Central*, 438 U.S. at 136 (no taking found where remaining uses allowed a profit and "reasonable return" on investment).

> manner, but whether the property use allowed by the regulation is sufficiently desirable to permit property owners to "sell the property to someone for that use."

Park Avenue, 746 F.2d at 139 (quoting *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d Cir. 1984)). *See also Pompa Construction Corporation v. City of Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983) (the key question is whether others might be interested in purchasing the land for permitted uses).

The Second Circuit reasoned that the "reasonable return" methodology would lead to unfair results.

> For example, a focus on reasonable return would distinguish between property owners on the basis of the amount of their investments in similar properties (assuming an equal restriction upon the properties under the regulations), favoring those who paid more over those who paid less for the investments.

Park Avenue, 746 F.2d at 140.[28]

The Eleventh Circuit has added to the turmoil among the circuit courts on this issue. Rejecting the value-based methodology and reasonable return methodology, that circuit determines whether a use is economically viable by collapsing the *Lucas* categorical test back into the ad hoc factors set forth in *Penn Central*.

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[28] For example, assume two investors purchased identical properties at the same time for identical development purposes, but one investor, more shrewd than the other, paid considerably less for the property. Under [the reasonable return] theory of takings, the City would have to compensate the investor who paid more but not necessarily the one who paid less, since the percentage "return" received by each would turn on the amount of their respective investments.

Park Avenue Towers, 746 F.2d at 140 n.2.

For example, in *Resolution Trust Corporation v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994), the Eleventh Circuit held:

> Whether state action denies a landowner all or substantially all economically viable use of his property turns on the economic impact on the claimant and the extent to which the regulation interferes with investment-backed expectations.

Id. at 1549. *See also Reahard v. Lee County*, 968 F.2d 1131, 1135-36 (11th Cir. 1992) (to resolve whether there is a denial of all economically viable use, the factfinder must analyze "at the very least" the economic impact and the extent the regulation interfered with investment-backed expectations); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir. 1996).

In *Resolution Trust*, the Eleventh Circuit went on to hold that there was sufficient evidence to support the jury finding that the landowner was denied economically viable use of the property. *Resolution Trust*, 18 F.3d at 1549. Significantly, this finding was upheld by the Eleventh Circuit even though the value of the property never decreased below $2 million. *Id.* Under the value-based methodology in *Dodd*, that conclusion could not have been reached as a matter of law.

Of course, defining the economically viable use test by collapsing that test into the *Penn Central* factors has its own inherent inconsistencies. These were acknowledged, *but not reconciled*, by the Court of Federal Claims in *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (1992). In that case, like the Eleventh Circuit, the court stated that the *Penn Central* factors were to be utilized for "determination of whether there has been a deprivation of the economically viable use of land." *Id.* at 1345. However, in the very next paragraph, the court admits the circularity of using the *Penn Central* factors as the methodology for determining the economically viable use test.

> If the effect of the [regulation] was to deny plaintiff all economically viable use of its property, plaintiff would be entitled to compensation for a taking notwithstanding inquiry into the other factors outlined in *Penn Central*.

26 Cl. Ct. at 1345 (citing *Lucas*).

While the Ninth Circuit's narrow value-based methodology may be placed at one end of the spectrum of approaches to the economic viability test, perhaps the Federal Circuit's broad approach in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), should be placed at the other end. Under that case, the court considers the viability of permissible uses simply by conducting a complete and realistic assessment of all the relevant facts. As stated in *Florida Rock Industries*,

> Are alternative permitted activities economically realistic in light of the setting and circumstance, and are they realistically available?

18 F.3d at 1571. This approach rejects any specific methodology or outcome. Instead it places the weight of the analysis, not on a strict formula or a determination that "some value" might remain, but on whether the government action unfairly places the burden of public objectives on individuals. *Id.* ("[H]as the Government . . . allocat[ed] to some number of individuals, less than all, a burden that should be borne by all?").

In short, the circuit courts are widely split. The *Dodd* decision rejects, as a matter of law, a taking based on denial of all economically viable use if there is any use that has some value, even a value that represents a significant loss. The Second Circuit looks not for a total elimination of value but considers whether the permissible use is sufficiently attractive that the property can be sold for that use. The Eleventh Circuit collapses the economically viable use test into the *Penn Central* factors, focusing on reasonable investment-backed expectations and economic impact. Finally, the Federal Circuit determines

economic viability of a permissible use by looking at the entire setting and circumstances and determining whether the use is "economically realistic."

The words of Judge Cynthia Holcomb Hall continue to be true today. "[T]he precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987).

In *Lucas*, this Court was limited by the factual finding of the trial court. Because of how the issue was presented, the appropriate methodology to determine the "economically viable use" test was not able to be clearly set forth. The result is lower courts are now in substantial and direct conflict over the appropriate methodology to be applied. Only this Court can settle this issue that was left unanswered in *Lucas*.

The "economically viable use" test is a cornerstone of federal takings law. It is perhaps the most predominant theory relied upon by landowners seeking relief under the Fifth Amendment. Accordingly, it is critical that landowners, government, and courts correctly understand how to apply the test. The alternative is to continue with the lack of uniformity in the protection of constitutional rights.

This Court's grant of certiorari in *Del Monte Dunes v. City of Monterey*, No. 97-1235, is expected to answer the procedural question of whether a judge or a jury determines liability for a regulatory taking. But answering the judge/jury question is irrelevant if the substantive law to be applied by the judge or jury remains in conflict. *Dodd* provides the necessary opportunity to provide the much needed guidance on the substantive law.

Unfortunately, many of the prior takings cases addressed by this Court were framed as facial takings,[29] or were burdened with ripeness problems,[30] or involved extremely unique facts[31] thus limiting the practical scope of their precedent. Such limiting circumstances are not present in this case. Rather, this case presents an as-applied factual setting that enhances this Court's ability to establish clear guidance for the lower courts. This case is the type of regulatory taking case the lower courts, landowners, and local governments have clamored for this Court to address.

II

THE NINTH CIRCUIT'S DECISION THAT THE REASONABLENESS OF A LANDOWNER'S INVESTMENT-BACKED EXPECTATION IS A QUESTION OF LAW RATHER THAN A QUESTION OF FACT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Ninth Circuit in *Dodd* correctly recognized that, even where a categorical taking is not found under *Lucas*, a taking

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[29] *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 493-95 (1987); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. at 260 (only question was whether mere enactment of zoning constitutes a taking).

[30] *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 633 (1981).

[31] *Hodel v. Irving*, 481 U.S. 704 (1987) (escheat of inheritance rights); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on money held in court registry); *Andrus v. Allard*, 444 U.S. 51 (1979) (prohibiting sale of avian Indian relics).

may, nevertheless, be found under the ad hoc, factual inquiry of *Penn Central*. The district court, however, "did not proceed into such an evaluation." App. at A-15.

Rather than remanding for a determination under *Penn Central*, the Ninth Circuit decided to address, and dismiss, the Dodds' *Penn Central* claim in the first instance. In order to dismiss the *Penn Central* claim on review of summary judgment against the Dodds, the Ninth Circuit necessarily viewed the reasonableness of the Dodds' expectations as a question of law. By deciding the reasonableness of the Dodds' investment-backed expectation as a question of law rather than a question of fact, the Ninth Circuit directly conflicts with this Court's relevant decisions. In *Penn Central*, this Court stated that the taking inquiry is an "essentially ad hoc, factual inquir[y]." *Penn Central*, 438 U.S. at 124. One of the specific areas of factual inquiry identified by this Court is whether reasonable investment-backed expectations are undermined. *Id. See also Lucas*, 505 U.S. at 1015 (regulatory taking analysis is an essentially ad hoc, factual inquiry). The Ninth Circuit's decision that the reasonableness of the Dodds' expectation is a question of law also directly conflicts with *Del Monte Dunes v. City of Monterey*, which held that liability for a regulatory taking is properly determined by a jury. 95 F.3d at 1429-30.[32]

This Court ***has granted certiorari*** in *Del Monte Dunes v. City of Monterey*, No. 97-1235, in part to address whether

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[32] Even the district court recognized that a key "factual issue[]" was the "state of the zoning at the time the Dodds purchased their property." App. at B-12-13. The district court, however, did not reach that issue. "I do not reach the issue of the status of the zoning at the time the Dodds purchased their property." *Id.*

liability issues in a regulatory taking case are to be determined by the court rather than by a jury.[33] In *Dodd*, the panel purports to avoid this issue by deciding the reasonableness of the Dodds' expectations as a question of law appropriate for the appellate court to resolve in the first instance. App. at A-16. However, when the reasonableness question is correctly viewed as a factual inquiry, it becomes readily apparent that the record contains specific evidence "such that a reasonable jury could return a verdict" finding that the Dodds did have a reasonable expectation in being able to build a house. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); Federal Rules of Civil Procedure 56(e). For example, the record contains evidence that the application of Goal 4 to this property was uncertain. ER Tab 106, Volume 2 (Findings of Fact at 10, Exhibit E to Groen Declaration); ER Tab 58, Volume 1 (Forest Inventory at 3, Exhibit B to Dubrasich Declaration) (75% of parcel is not forested and over half does not have a soil type that will support forest vegetation). In addition, the County at the time interpreted Goal 4 as allowing a house on this property. ER Tab 12, Volume 1 (Amended Answer at 2:16-21) (County zoning allowed a house); ER Tab 54, Volume 1 (Findings of Fact at 30, Exhibit F to Stephens Declaration) (County planning director admitted that if the Dodds had applied in 1984, they would have been able to build); ER Tab 53, Volume 1 (Exhibit B to Dodd Declaration) (In January, 1984, a year after *Lamb v. Lane County* was decided, the County issued a Compatibility Statement to the Dodds that a dwelling was compatible with statewide planning goals.). In addition, all the information the Dodds were able to acquire about the property confirmed that a

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[33] The first question presented in *Del Monte Dunes* is as follows: 1. Whether, in a regulatory taking action challenging a local land-use decision, 42 U.S.C. § 1983 requires that all liability issues be determined by the court rather than by a jury?

residence would be allowed. ER Tab 53, Volume 1 (Dodd Declaration at 2). Even when the County amended its zoning in February, 1984, to comply with state wide planning goals, the new zoning continued to allow a house on a 40-acre parcel such as the Dodds. ER Tab 106, Volume 2 (Ordinance No. 125, Exhibit C to Groen Declaration). Finally, the Oregon State Legislature passed a law acknowledging that it was not reasonable for property owners prior to 1985 to have known that restrictions were being put in place that would limit their ability to build a home. ORS 215.700.

The Dodds do not seek for this Court to resolve or weigh the evidence. Rather, the Dodds seek a remand to allow the trier of fact to decide the factual issue of whether they had reasonable expectations in being able to build.

The Dodds' case illustrates why this Court should rule in *Del Monte Dunes* that liability in inverse condemnation cases should be tried by a jury. The evidence here is a prime example that liability is indeed an "essentially factual" inquiry. By attempting to address that factual inquiry and characterize it as a question of law, the appellate court usurped the role of the trier of fact and deprived the Dodds of their day in court.

Since certiorari has been granted in *Del Monte Dunes*, the Dodds recognize that the substance of their second question presented—regarding the jury question—is already before this Court. Accordingly, with respect to the second question presented, the Dodds request that their petition be granted and the matter be subsequently remanded for determination in light of this Court's decision in *Del Monte Dunes*.

CONCLUSION

The circuit courts have produced a chaotic jumble of methodologies regarding how to apply the "economically viable use" test set forth in *Agins* and *Lucas*. The multiple conflicts among the lower courts can only be settled by this Court. Petitioners respectfully urge that review be granted so this Court can provide the guidance needed to bring uniformity in this important area of constitutional law.

DATED: July, 1998.

Respectfully submitted,

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Filed 2/13/98

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS DODD; DORIS DODD,
Plaintiffs-Appellants,

v.

HOOD RIVER COUNTY,
Defendant-Appellee,

and

STATE OF OREGON,
Defendant-Intervenor-Appellee.

No. 97-35124

D.C. No.
CV-91-1157-JO

OPINION

On Appeal From the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
January 7, 1998--Portland, Oregon

Filed February 13, 1998

Before: Ruggero J. Aldisert,* Harry Pregerson and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Aldisert

* Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

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OPINION

ALDISERT, Circuit Judge:

This latest chapter of the long-running state and federal judicial saga in the zoning controversy between Thomas and Doris Dodd on one side and Hood River County and the State of Oregon on the other requires us to decide whether the Dodds are entitled to compensation under the Fifth Amendment's Takings Clause that was denied them in previous state court and agency proceedings involving takings under Article I, Section 18, of the Oregon Constitution. The district court denied them relief. We affirm the judgment of the district court, albeit for different reasons.

In reaching this decision we hold that the district court did not err in applying the doctrine of issue preclusion against the Dodds in the federal proceeding because they had not been totally deprived of some substantial beneficial use of their property, as adjudicated in the state administrative and judicial proceedings.

This case has a long history, the facts of which are set out in our previous opinion in *Dodd v. Hood River County*, 59 F.3d 852, 855-857 (9th Cir. 1995) (*Dodd IV*). We will summarize them here.

Appendix A-3

I.

In November, 1983, the Dodds purchased a 40-acre parcel in a Forest Use Zone in Hood River County, intending to build their retirement home. *Dodd v. Hood River County*, 22 Or. LUBA 711, 714-715 (1992) (*Dodd I*) (the Oregon Land Use Board of Appeals, or "LUBA," proceeding). At the time of the purchase, Oregon state law permitted dwellings to be built in Forest Use Zones only if "necessary and accessory" to forest use. *See* State Land Conservation & Dev. Comm'n Goal 4, Or. Admin. R. 660-15-000(4); *Lamb v. Lane County*, 7 Or. LUBA 137, 143 (1983) (interpreting and setting standard for compliance with Goal 4). State law also required county zoning ordinances to comply with Goal 4. Or. Rev. Stat. §§ 197.175, 197.250; *see also Alexanderson v. Board of Comm'rs*, 289 Or. 427, 434-435 (1980). Hood River County's zoning ordinances, however, were not yet compatible with Goal 4 at the time of the Dodds' purchase. But for the prohibitions set forth in the Oregon statute, the Dodds may have been able to build a residence under the County's zoning scheme, as it was worded.

At about the time of the purchase, the Dodds received several notices from the County which they interpreted as authorization for them to build a residence. Months before the purchase, the County Sanitarian prepared a report for the previous owner stating that the parcel was suitable for a septic system. In January, 1984, an employee of the County Planning Department signed a "Land Use Compatibility Statement" stating that a residence on the parcel would be compatible with statewide planning goals. In February, 1984, the Sanitarian sent the Dodds a letter stating that their plans to build a residence "would appear to leave opportunity for the water supply system to be developed." However, none of these notices stated that the permits necessary for the Dodds to build their residence would be issued; the Sanitarian's first letter expressly stated that it was not to be considered such a representation.

During the same time period, the County sent notice to the Dodds' predecessor-in-interest, and published other notices, stating that its zoning ordinances were in the process of being amended to comply with Goal 4. In February, 1984, the County passed an ordinance changing the zoning of forest land, but fearing that this still did not comply with Goal 4, passed another ordinance in December, 1984 which adopted the "necessary and accessory" test for the building of residences in Forest Use Zones.

In 1990, the Dodds applied to the County Planning Department for a land use permit, a conditional use permit and a comprehensive plan and zone change that would allow them to build a residence on the parcel. All were denied. In an appeal to the County Planning Commission in April, 1991, two public hearings were held before the Commission upheld the Department's decision. The Dodds appealed to the Board of County Commissioners, which also held a public hearing before upholding the decision.

The Dodds then appealed to LUBA, arguing that the denial was a taking under Article I, Section 18, of the Oregon Constitution. LUBA also affirmed. LUBA considered a written appraisal of the parcel submitted by the Dodds, which estimated the value of the parcel without the benefit of the Dodds' proposed residence, adding the value of the timber currently available on the land to the value of the land suitable for future timber growing, to be $691.81. The County also submitted a letter from its Forester, who declared that the Dodds, after subtracting expenses, could yield at least $10,000 from harvesting the timber. LUBA found that the Dodds' proposed residence was not "necessary and accessory" to forest use. It also found that there was no taking under the Oregon Constitution because the land could "produce a net profit if properly managed for timber production," and thus the Dodds were not denied a "substantial beneficial use of the property." *Dodd I*, 22 Or. LUBA at 732.

Appendix A-5

The Oregon Court of Appeals, *Dodd v. Hood River County*, 115 Or. App. 139 (1992) (*Dodd II*), and Oregon Supreme Court, *Dodd v. Hood River County*, 317 Or. 172 (1993) (*Dodd III*), each affirmed the decision. The Oregon Supreme Court determined that the record supported the Dodds' potential profit from forest use of the land and denied relief under the Oregon Constitution. *Dodd III*, 317 Or. at 180, 185. Because the Dodds expressly reserved their takings claim under the Fifth Amendment, the federal issue was not presented in the Oregon administrative and judicial proceedings.

Before the Oregon Supreme Court had decided the case, the Dodds filed suit under 42 U.S.C. § 1983 in federal district court, before which the Dodds made their taking argument under the Fifth and Fourteenth Amendments of the United States Constitution. The district court dismissed the claim as unripe. The Dodds appealed and, because the Oregon Supreme Court decided the case during the pendency of the appeal, we decided that the federal issue was ripe and remanded. *Dodd IV*, 59 F.3d at 865.

On remand, the district court had to determine, *inter alia*, whether the Dodds' claim under the Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, requires a broader inquiry than a claim under the Takings Clause of the Oregon Constitution. This was to be a threshold decision by the district court before it could determine whether the Oregon state agency determination under the Oregon Constitution precluded the Dodds from proceeding under the Fifth Amendment to the United States Constitution. The district court determined that there was no fundamental distinction between the takings analysis under the two constitutions and, therefore, that the Dodds were precluded from obtaining federal court relief.

II.

We review the district court's grant of summary judgment de novo. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997). We must determine, viewing the evidence in the light most favorable to the Dodds, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

III.

At issue here is a concept that is traditionally known as and is still most frequently called "collateral estoppel" by the courts. *See* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4402 (1981). The terms "issue preclusion" and "collateral estoppel" have been used interchangeably by both the parties and the courts in this case. However, we have previously expressed our preference for the term "issue preclusion" and will here refer to the concept by this term. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 n.2 (9th Cir. 1988).

Under the doctrine of issue preclusion, a valid and final determination in one proceeding of a necessary factual or legal issue--here the value of the Dodds' land--may not be relitigated in a subsequent proceeding involving a party to the prior action. *See Fisher Broad. v. Department of Revenue*, 321 Or. 341, 347 (1995). This judicially-created doctrine, as with res judicata, serves to promote judicial efficiency by preventing multiple lawsuits and to enable the parties to rely on the finality of adjudications. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Federal courts must give state court judgments the same preclusive effect as they would be given by courts of that state. Full Faith and Credit Act, 28 U.S.C. § 1738; *Parsons Steel v. First Ala. Bank*, 474 U.S. 518, 525 (1986). Therefore, Oregon law dictates our analysis of issue preclusion. *See Allen*, 449 U.S. at 96.

Under Oregon law, LUBA's determination that the Dodds were not "denied a 'substantial beneficial use of [their] property,'" *Dodd I*, 22 Or. LUBA at 732, will be given preclusive effect in a subsequent proceeding if five requirements are met:

> 1. The issue in the two proceedings is identical.
>
> 2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.
>
> 3. The [Dodds] had a full and fair opportunity to be heard on that issue.
>
> 4. The [Dodds were parties in] or w[ere] in privity with a party to the prior proceeding.
>
> 5. The prior proceeding was the type of proceeding to which [Oregon courts] will give preclusive effect.

See Nelson v. Emerald People's Util. Dist., 318 Or. 99, 104, (1994) (citations omitted). The Dodds were, of course, parties before LUBA, but they contest all other factors.

1.

In deciding that the Dodds' property was not "taken" under Article I, Section 18, of the Oregon Constitution, LUBA framed its analysis by the following test: "Where a [land use regulation] allows a landowner some substantial beneficial use of his property, the landowner is not deprived of his property nor is his property 'taken.'" *Dodd I*, 22 Or. LUBA at 728 (quoting *Fifth Ave. Corp. v. Washington Co.*, 282 Or. 591, 609 (1978)). In comparison, a takings analysis under the Fifth and Fourteenth Amendments to the United States Constitution involves, as one factor, determining whether a land owner has been deprived of "economically beneficial uses" of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). For purposes of issue preclusion, this single issue is identical because the "question expressly and definitely presented in this

suit is the same as that definitely and actually litigated and adjudged" before LUBA. *See Montana v. United States*, 440 U.S. 147, 157 (1979) (citation omitted).

Under Oregon law, issues are not identical for preclu-sion when "the underlying facts relevant to the determination of [the issue] are not the same." *Fisher*, 321 Or. at 347. As the district court described the federal and state takings analyses, "[f]or either test, the underlying factual issue is identical: what is the value of the property after the regulation is in place?" LUBA considered each party's appraisal and concluded that the Dodds could "produce a net profit" from the land. *Dodd I*, 22 Or. LUBA at 732.

The federal takings analysis of "economically viable use" comports with LUBA's analysis: "the existence of per-missible uses determines whether a development restriction denies a property owner economically viable use of his property." *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996), *aff'd on reh'g*, 127 F.3d 1149 (9th Cir. 1997). LUBA's decision that the Dodds could profit from the land notwithstanding the use restriction thus satisfies the "identical issue" prong of issue preclusion.

2.

A prior proceeding will preclude reconsideration of an issue "only as to those matters in issue or points controverted, upon determination of which the finding or verdict was rendered." *Sea-Land Serv. v. Gaudet*, 414 U.S. 573, 593 (1974); *see also McCall v. Dynic USA Corp.*, 138 Or. App. 1, 7, (1995) (issue "actually litigated" when, "because of the way plaintiff framed the issues in the [previous action before Workers' Compensation Board,] the Board necessarily had to decide" the same issue presented in later action). It is sufficient for the "actually litigated" prong that LUBA expressly considered the Dodds' evidence presented on the alleged $691.81 value of the parcel, found the evidence to be unper-suasive and based its conclusion

that there was no taking on that finding. *Dodd I*, 22 Or. LUBA at 732; *see also State Farm Fire & Cas. Co. v. Sallak*, 140 Or. App. 89, 94 (1996) (guilty plea to criminal charge is "actually litigated" for preclusive effect because court accepting plea must ensure that plea is founded on fact). Thus, the issue was actually litigated and essential to LUBA's decision.

3.

A full and fair opportunity to be heard is provided at an administrative adjudication such as the Dodds' proceeding before LUBA "if the parties had both a full opportunity and the incentive to contest the point at issue on a record that also was subject to judicial review." *See Chavez v. Boise Cascade Corp.*, 307 Or. 632, 635 (1989). The Dodds argue that they had no incentive to litigate the issue of the parcel's remaining value because "both parties and LUBA were well aware that the Dodds had filed their federal constitutional claim in federal court and had expressly reserved the right to litigate the claim in that forum." The fallacy of irrelevance, or *ignoratio elenchi*, abounds in the Dodds' argument. That the Dodds had no incentive to litigate the federal claim is irrelevant to the question of their incentive to litigate the actual issue involved -- the value of their land--in the state takings claim being adjudicated at the time. The incentive for the Dodds to litigate the issue before LUBA was great: Were they to succeed, LUBA had the express authority to grant them relief under the Oregon Constitution. Or. Rev. Stat. § 197.835(9)(a)(E); *see Dunn v. City of Redmond*, 303 Or. 201, 209 (1987).

The Dodds argue that LUBA did not afford them a full and fair opportunity to be heard because its procedures were not as formal as those found in court proceedings. Specifically, at its hearing LUBA considered as evidence written documents that were not sworn testimony, and no witnesses were cross-examined. Under Oregon law, however, the Dodds could have requested a full evidentiary hearing before LUBA, which would have given them all of the procedures they claim were

erroneously lacking in their own hearing. *See* Or. Rev. Stat. § 197.835. Had the Dodds asked for and utilized these procedures, there is no doubt that they would have received a full and fair opportunity to litigate. *See Hickey v. Settlemier*, 116 Or. App. 436, 439 (full and fair opportunity to litigate when plaintiff was represented by counsel and allowed to cross-examine witnesses, a transcript was provided, there was a neutral factfinder and the decision was subject to judicial review), *rev'd on other grounds*, 318 Or. 196 (1993). But the Dodds did not ask for the evidentiary hearing. We must decide, therefore, if the availability of these procedures was enough to satisfy this prong of the issue preclusion doctrine. We conclude that it was.

The Dodds argue that a "full and fair opportunity" to be heard should mean "full and fair utilization" of due process procedures:

> [T]hus, when governmental agencies adjudicate or make binding determinations which directly affect legal rights of individuals, it is imperative that those agencies use procedures which have traditionally been associated with judicial process.

Hannah v. Larche, 363 U.S. 420, 442 (1960). In that case, the Court held that the Civil Rights Commission, in conducting only investigative proceedings, did not need to satisfy the same due process requirements to which adjudicative bodies must adhere. *Id.* at 451. In *Hannah*, the Court did not address the distinction between the availability and utilization of such procedures, but it did so in *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 483 (1982), in which the Court found that New York law provided a person who alleged employment discrimination with procedures that satisfied due process; New York law included, in part, the "opportunity" for the claimant to present his case before a state agency that considered exhibits and witness testimony. The Court specifically stated that the "fact that [the claimant] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Id.*

at 485. The Court then gave res judicata effect to the state agency decision on the discrimination claim. *Id.*

Similarly, the Dodds' own failure to request a full evidentiary hearing before LUBA should not enable them to avoid the operation of the issue preclusion doctrine now. Otherwise, parties who desire to pursue actions in a different forum could do so without fearing the effects of issue preclusion by merely failing to pursue a claim by all procedures available to them in the first forum. The Dodds were given a sufficient opportunity to be heard on the land value issue.

4.

For issue preclusion to apply against the Dodds, the LUBA proceeding must be the "type of proceeding" to which the state courts of Oregon would give preclusive effect. *See Nelson*, 318 Or. at 104. Oregon courts have denied preclusive effect only to administrative proceedings that lacked certain safeguards. *See, e.g., State v. Ratliff*, 304 Or. 254, 258-259, (1987) (no neutral judge and both parties not present); *Chavez*, 307 Or. at 637-638 (no clear record or clear findings). Safeguards were in place at the LUBA hearing, however, and there is no justification for departing from Oregon's general rule.

LUBA was required to, and did, make independent findings on a record, and gave the parties the opportunity to present additional information. Or. Rev. Stat. § 197.835(2); Or. Admin. R. 661-10-025, 026. The parties submitted briefs and made oral arguments. Or. Admin. R. 661-10-030, 039, 040. LUBA afforded the Dodds the opportunity to have an evidentiary hearing, at which they could have subpoenaed and cross-examined witnesses, and its decision was subject to judicial review. Or. Rev. Stat. § 197.850; Or. Admin. R. 661-10-045. Moreover, the Oregon Court of Appeals has given a LUBA decision preclusive effect under the related doctrine of res judicata. *Springer v. City of Bend*, 111 Or. App. 136, 139 (1992).

The substantial procedures available to the Dodds before LUBA in litigating the issue of the value of their land, as well as the review by the Oregon courts, demonstrate that it was fair and efficient for the district court to decide the Dodds are precluded from relitigating the issue. *See Drews v. EBI Cos.*, 310 Or. 134, 141 (1990).

5.

Nor does the Dodds' previous reservation of this federal takings claim under the doctrine of *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964); *United Parcel Serv. v. California Pub. Util. Comm'n*, 77 F.3d 1178, 1183 (9th Cir. 1996), prevent operation of the issue preclusion doctrine. Because the Dodds were effectively able to reserve their claim for federal court, *Dodd IV*, 59 F.3d at 862, the reservation doctrine does not enable them to avoid preclusion of issues actually litigated in the state forum. *See Temple of the Lost Sheep v. Abrams*, 930 F.2d 178, 181-183 (2d Cir. 1991) (citing *Beltran v. State of California*, 871 F.2d 777, 783 n.8 (9th Cir. 1988)); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990).

We have previously applied issue preclusion where both parties to a state court proceeding implicitly acquiesced to the splitting of a civil rights claim in a concurrent federal court proceeding. *See Clements v. Airport Auth.*, 69 F.3d 321, 330 (9th Cir. 1995). This case is similar. Here, the Dodds explicitly asked the Oregon courts to refrain from addressing the takings issue under the federal Constitution so the Dodds could argue that claim in a federal forum. To the extent that they fully litigated a necessary issue in the course of the state proceedings that is identical to an issue before the federal court, the Dodds are precluded from taking a second bite of the apple. The teachings of the Supreme Court are instructive in this regard:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an

> unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104. The district court correctly applied issue preclusion against the Dodds.

IV.

The district court held that, because the Dodds had some value remaining in their land through forest use, they could not suffer a regulatory taking as a matter of federal law. However, we had instructed the district court to decide on remand "whether a factual predicate is necessary" to distinguish between a takings analysis under the Oregon and United States Constitutions. *Dodd IV*, 59 F.3d at 863. We drew attention to the Oregon Supreme Court's suggestion in this case that the "investment-backed expectations" factor was not part of the state analysis but was part of a federal takings analysis. Remand was necessary "because the development of a factual record may be necessary to illustrate the resemblances and the distinctions between claims brought under the Oregon and federal constitutions." *Id.*

In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of the other factors commonly analyzed in takings law--reasonable investment-backed expectations and legitimate government interests--would be necessary. 505 U.S. at 1015. This all-or-nothing economics test was the test applied by the Oregon Supreme Court in this case to decide the takings issue under the Oregon Constitution. *Dodd III*, 317 Or. at 181 (noting that the tests under the state and federal Constitutions "are not necessarily identical," but for purposes of the Oregon takings analysis, because the Dodds were still allowed "some substantial beneficial use" of their land, there could be no taking under state law).

However, when a government regulation prohibits something less than all economically beneficial use and causes at most a partial loss in economic use, the fact that there has been no categorical taking does not end the analysis under federal law. The Supreme Court has stated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citations omitted). When something less than "all" economically viable use has been destroyed, the oft-quoted test for determining whether the government has taken property through regulation in violation of the Fifth Amendment is that a violation occurs when the regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 (9th Cir. 1994) (quoting *Lucas*, 505 U.S. at 1016 (citation omitted)).

This test has been restated and reapplied many times, but it is still not refined with precision. *See, e.g., Florida Rock Indus.v. United States*, 18 F.3d 1560, 1564 (Fed. Cir. 1994) (noting that the test is the "subject of on-going debate" in extensive literature). The Eleventh Circuit has interpreted the Supreme Court's takings analysis in *Nollan v. California Coastal Com'n*, 483 U.S. 825, 834 (1987), as requiring first an analysis of whether a particular regulation substantially advances a legitimate state interest. *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992). The court went on:

> If the regulation does not substantially advance a legitimate state interest, it can be declared invalid. The second test is whether a regulation denies an owner economically viable use of his property. In Nollan, the Court found that the [regulation] failed the first test and thus violated the takings clause. The Court did not reach the second test.

Id. at 1135-1136. The Eleventh Circuit concluded that an analysis of "economically viable use" necessarily leads to a discussion of "the extent to which the regulation has interfered with investment-backed expectations." *Id.* We too have recognized that a federal takings analysis involves balancing these three factors:

> The Supreme Court has suggested that where an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations. Traditionally, the type of governmental interference also is considered a factor relevant to the takings inquiry.

Del Monte Dunes, 95 F.3d at 1432.

At its barest, the federal takings test has not been given a "precise rule," but "the question necessarily requires a weighing of private and public interests." *Agins v. Tiburon*, 447 U.S. 255, 261 (1980). The district court did not proceed into such an evaluation here. We must now decide whether to remand for this purpose or to decide this issue ourselves on the facts of the record before us.

V.

We may decide the takings issue on our own, provided that no additional fact-finding is necessary and certain requirements are met. As we noted in *Dodd IV*, "[c]ertainly there are circumstances in which a federal appellate court is justified in

resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Dodd IV*, 59 F.3d at 863 (quoting *Golden Gate Hotel Assoc. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994)). We required the district court to decide "whether a factual predicate is necessary." The district court decided that no additional factual findings were necessary, and an examination of the record indicates that the court did not err in this respect because the material facts are not in dispute.

We have decided that this is an appropriate case for this court to consider and rule on the other takings factors which the district court did not address. We are influenced by several factors. First, there is the backdrop of the Dodds' lengthy history of pursuing this case--before the state administrative agencies, followed by appeals to the Oregon Court of Appeals and Oregon Supreme Court, the first proceeding before the district court, the first appeal to this Court, the second proceeding before the district court and this second appeal here. Second, we have applied issue preclusion against the Dodds in order "to strike a delicate balance between the interests of the defendant and of the courts in bringing litigation to a close and the interest of the plaintiff in the vindication of a just claim." *See Hanson v. Oregon Dep't of Revenue*, 294 Or. 23, 31 (1982).

Third, even if we were to remand this case, the district court would have to apply appropriate legal precepts, which are not controverted, to the material facts of this case, which are not in dispute. Under the unusual circumstances presented here, because "the proper resolution is beyond any doubt," we can perform that function here.

I.

On remand, the district court would be required to analyze Oregon's interest in enacting and enforcing Goal 4, but there is no question what its conclusion would be: The government's interest was certainly legitimate. Goal 4 was enacted to promote

commercial timber practices by limiting dwellings that could adversely affect forest uses and practices, such as fire protection and the application of chemicals. These interests are legitimate. They are directly in line with other governmental interests recognized as legitimate by the Supreme Court. *See, e.g., Nollan*, 483 U.S. at 834-35 (preservation of scenic values, designated landmarks and restrictions designed to protect public safety); *Agins*, 447 U.S. at 261 (protection against air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood and other demonstrated consequences of "urban sprawl"). We conclude that the governmental interest in enacting Goal 4 and applying it to the Dodds was legitimate.

2.

The district court would have to analyze what, if any, "investment-backed expectations" the Dodds may have had when they purchased the 40-acre parcel. It is untenable for the Dodds to argue that they reasonably expected to build their retirement home in a Forest Use Zone without having to comply with Oregon state law at the time. At all times relevant to this case, Oregon state law permitted dwellings to be built in Forest Use Zones only if "necessary and accessory" to forest use. State Land Conservation & Dev. Comm'n Goal 4, Or. Admin. R. 660-15-000(4); *see Lamb*, 7 Or. LUBA at 143. Moreover, the Dodds could not reasonably have relied on any of the notices sent by the County Sanitarian and other officials relating to their parcel of land: Not one of these notices stated that the Dodds would ever be granted the necessary permits for their retirement home to be built. Even the Oregon Supreme Court, after noting that "[t]his court has never held that investment-backed expectations are part of any Article I, section 18 analysis" and refusing to so hold in this case, nevertheless suggested that "any investment-backed expectations [the Dodds] may have had were not reasonable." *Dodd III*, 317 Or. at 185. Against the

background of the uncontroverted facts, this conclusion appears obligatory.

In reality, the facts of this case weigh heavily against the Dodds. Any "reasonable investment-backed expectations" the Dodds may have had were minimal at best and ephemeral at worst. The entire gravamen of their complaint was that they intended to build their retirement home on that parcel, not that they intended the parcel for any commercial investment. Given that they now have the authority to commence building, at best their only means of calculating damages is by the financial loss sustained by the delay in building this private home. Curiously, however, the Dodds have pursued their alleged expectation to build with something less than speed or vigor. They completed the purchase of the land in 1984, but waited until 1990 to file the necessary applications with the County in order to build their home. In addition, following the County's July 1, 1996, decision to permit the Dodds to build their retirement home, the Dodds to this day have failed to commence construction. Certainly then, time was not, and is not, of the essence for the Dodds. They claim to have suffered unjust delay at the hands of Hood River County, and yet the record makes clear that the Dodds' supposed expectation to build their retirement home has been delayed, in part, by their own choice. Therefore, the Dodds lack "reasonable investment-backed expectations" to build their residence.

3.

The Courts of Appeals were not created to be "the Grand Mufti of local zoning boards," *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989), nor do they "sit as [ ] super zoning board[s] or [ ] zoning board[s] of appeals." *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). The Dodds ask us to remand their case to the district court so they can argue, yet again, what is a losing cause. It is "beyond any doubt" that the specific issues they hope to relitigate can only be resolved against them. Perhaps more importantly, the Dodds'

attempt to overburden even further the precious judicial resources of the federal courts would result in patent injustice. *See Dodd IV*, 59 F.3d at 863.

The district court correctly applied issue preclusion against the Dodds, but did not complete the inquiry that is required where there is not a total taking under federal law. We have completed the federal takings analysis by concluding that the governmental interest in enacting and enforcing Goal 4 was legitimate and that the Dodds did not have a reasonable investment-backed expectation to avoid state law in order to build their retirement home. Therefore, the judgment of the district court is **AFFIRMED.**

Appendix B-1

Filed 12/12/96

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THOMAS and DORIS DODD, Plaintiffs, v. HOOD RIVER COUNTY, an Oregon Municipal Corporation, Defendant. and STATE OF OREGON, Intervenor-Defendant.	)	Civil No. 91-1157-JO **OPINION AND ORDER**

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JONES, Judge:

On remand from the Ninth Circuit, the Dodds assert a Fifth Amendment takings claim against the State of Oregon and Hood River County arising out of their inability to build a house on land they own in a Forest Use zone. The defendants have now jointly moved (95) for summary judgment on this issue. Because defendants are entitled to judgment as a matter of law, summary judgment is GRANTED.

PROCEDURAL POSTURE

This case has along procedural history, which began when Hood River County denied the Dodds' "consolidated request for permits and zone and comprehensive plan map amendments and zone and comprehensive map amendments to allow construction of a single family dwelling on their 40 acre parcel." *Dodd v.*

Hood River County, 22 Or. LUBA 711, 714 (1992). The Dodds appealed this denial through the Oregon Land Use Board of Appeals (LUBA), the Oregon Court of Appeals, and the Oregon Supreme Court, claiming various procedural errors and violations of Oregon constitutional law.[1] *See Dodd v. Hood River County*, 22 Or. LUBA 711 (1992); *Dodd v. Hood River County*, 115 Or. App. 139 (1992); *Dodd v. Hood River County*, 317 Or. 172, 187 (1993). At every stage, the reviewing body affirmed Hood River County's denial of the Dodds' permit, zoning and comprehensive plan requests.

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[1] Before LUBA, the Dodds claimed: (1) Hood River County improperly construed the applicable zoning law by limiting the relevant forest uses; (2) Hood River County improperly construed the requirement that a dwelling be "necessary and accessory" to a forest use; (3) Hood River County's determination that the Dodds' proposed dwelling was not necessary and accessory to forest use was not supported by the evidence; (4) Hood River County improperly construed the applicable conditional use permit provision by requiring that a dwelling be "necessary and accessory" to a forest use; (5) Hood River County's decision to deny the Dodds a conditional use permit was not supported by the evidence; (6) Hood River County failed to follow proper procedures with regard to the Dodds' application; (7) Hood River County's findings on whether its denial effected a "taking" of the Dodds' property were not supported by the evidence; (8) Hood River County's denial effected a "taking" of the Dodds' property in violation of Article I, section 18, of the Oregon Constitution; (9) Hood River County exceeded its jurisdiction by taking a conservation easement in the Dodds' property to ensure its use for forest uses; (10) Hood River County improperly construed the zoning law by failing to consider its potential liability for "takings" claims; (11) Hood River County's decision to deny the Dodds' proposed zone and comprehensive plan change was not supported by substantial evidence; and (12) Hood River County erred in not considering the Dodds' property's negligible use for commercial forest production. *Dodd v. Hood River County*, 22 Or. LUBA at 715-733.

However, the Dodds reserved their federal *claims*. *See Dodd v. Hood River County*, 22 Or. LUBA at 715, which they pursued by filing suit in the Oregon federal district court on November 5, 1991 and asserting violations of the federal Constitution pursuant to 42 U.S.C. § 1983. See *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir. 1995). In addition to the federal takings claim, plaintiffs asserted violations of substantive due process and equal protection. Defendants moved for summary judgment on all claims, which this court granted for all claims except the takings claim. This court dismissed the federal takings claim as not being ripe because the Oregon Supreme Court had not yet decided the Dodds' state-court appeal.

The Dodds appealed this court's dismissal of their case to the Ninth Circuit, which affirmed on all claims except the Fifth Amendment takings claim. The Ninth Circuit expressly held that it could not dismiss the Fifth Amendment claim on the basis of claim preclusion (res judicata) from the state court cases. *Dodd v. Hood River County*, 59 F.3d at 862. However, it explicitly left to this court the decision as to whether the claim was barred by issue preclusion (collateral estoppel) because the Oregon courts had decided that no taking had occurred under the Oregon Constitution. *Id.* at 863. Thus, the Ninth Circuit did not reach the merits of the Fifth Amendment takings claim. *Id.*

FACTS

Despite the Dodd's lengthy series of court battles, only two entities have made actual findings of fact: Hood River County and LUBA. Because the exact findings of fact are critical to the issue now before this court--namely, the effect of issue preclusion upon the Dodds' federal takings claim--I set out the facts as LUBA found them.

LUBA's statement of facts for the Dodds' case is as follows:

The 40 acre parcel at issue in this appeal is subject to Statewide Planning Goal 4 (Forest Lands) and is designated on the comprehensive plan and zoning maps as Forest (F-1). The minimum parcel size in the F-1 zone is 40 acres. The Primary Forest (F-2) zone establishes a minimum parcel size of 80 acres. The subject property is surrounded by parcels designated and zoned F-1 and F-2.

The property is assessed for tax purposes as forest land. At present approximately 32% of the property is covered with Douglas fir, the remainder with oak, brush, and other vegetation. The County Forest Manager estimated during the local proceedings that if the property were logged, the value of the merchantable timber on the property, after deducting logging costs and the cost of reforesting the property, would be $10,000.

Petitioners purchased the subject property in November 1983 for $33,000. At the time the property was zoned F-1, but the F-1 zone at that time did not require that dwellings be "necessary [for] and accessory to" forest use. At the time the property was purchased, it had been illegally partitioned. The property was legally partitioned on January 24, 1984.

The [Hood River County] planning director denied petitioners' requests for a land use permit and conditional use permit to allow a dwelling on the subject property. The planning director also recommended denial of petitioners' requests for plan and zone changes to allow construction of a dwelling on the subject property. The planning commission conducted two public hearings on petitioners' requests and denied the permit applications and recommended denial of the plan and zone changes. The board of county commissioners conducted a

> public hearing limited to the record before the planning commission and denied the permits and requested plan and zone changes. This appeal followed.

Dodd v. Hood River County, 22 Or. LUBA at 714-15 (footnote omitted). LUBA also noted that "[f]or tax deferral purposes, forest land is ranked FL-1 through 6. FL-1 is the most productive forest land and FL-6 is the least productive. The subject property is ranked FL-3." *Id.* at 715 n.1.

At the time Hood River County decided to deny the Dodds' applications, several years after the Dodds purchased their property, the Hood River County Zoning Ordinance 5.10 (I) (1) provided that "a single family dwelling may be approved in the F-1 zone if the applicant demonstrates that the dwelling is 'necessary [for] and accessory to a forest use.'" *Dodd v. Hood River County*, 22 Or. LUBA at 716. More specifically:

> A dwelling which is "necessary [for] and accessory to forest use" is allowable as a permitted use in the F-1 zone on both conforming parcels and nonconforming parcels (i.e. parcel smaller than the 40 acre minimum parcel size established in the F-1 zone). Additionally, on nonconforming parcels, but not on conforming parcels, permanent dwellings which are not "necessary [for] and accessory to forest use," may be allowed as a conditional use in the F-1 zone, subject to certain approval criteria and site development standards.

Id. at 721 (footnote omitted).

Hood River County adopted this ordinance "to comply with Goal 4." *Id.* at 717. As LUBA noted, the Oregon Supreme Court has determined that "'Goal 4 sets a high standard when it requires that "[e]xisting forest uses shall be protected unless proposed changes are in conformance with the comprehensive plan."'" *Id.* at 718 (quoting *1000 Friends of Oregon v. LCDC*

(Lane County), 305 Or. 384, 396 (1988) (quoting statewide Land Use Planning Goal 4)).

In makings its determination that there was no "taking" under the Oregon Constitution, LUBA reviewed the evidence of the property's value for forest production from both sides:

> Turning to the facts in this case, petitioners' expert testified that 32% of the property (12.6) acres) includes Ketchly soils and in covered with Douglas fir. The existing stand of Douglas fir is forty to sixty years old, with some grand fir and ponderosa pine mixed in. The expert estimated the growth of this stand over the next two decades to be only 24 cubic feet per acre per year, a rate "generally considered to be less that necessary for commercial timber management." Record (Appendix 3) 59. He also identified 5.7 additional acres of thinner Ketchly soils, covered with Hazel Brush, that he concluded could not economically be reforested with commercially viable conifers. The expert went on to estimate the total current net value of the timber on the property at $691. Record (Appendix 3) 59-65.

A representative of the Oregon Department of Forestry disputed the conclusions of petitioners' expert.

> "[T]he Department finds that the management plan correctly identifies the soils, but information about the forest capability is inconsistent with our data. Information about Ketchly soils in the Soil Conservation Survey of Hood River County (1981), prepared by the United States Department of Agriculture, Soil Conservation Service, establishes that the Douglas-fir 100 year site index is 100 * * * . This site index is for a fully-stocked unmanaged stand * * * . Such stands will produce a mean annual increment of approximately 207 board feet

> per acre per year up to 90 years of age * * * . This approximates 80 cubic feet per acre per year productivity. Fully-stocked managed stands will likely produce additional volume.
>
> "It appears that the productivity figure of 24 cubic feet referenced in the report * * * was intended to quantify the productivity of the existing stand and not the productivity potential of the site * * * .
>
> "Therefore, the portion of the subject parcel containing Ketchly soils is suitable for forest management. As a case in point, forest management is currently being practiced on land adjacent to the east and south * * * . According to the SCS Soil Survey, this land also contains Ketchly soils some of which have greater constraints (due to steep slopes) than the Ketchly soils on the subject parcel." Record 282.

In addition, the County Forest Manager estimated that there are 24 acres on the property that could be used for forest production. The County Forest Manager questioned a number of the assumptions petitioners' expert relied upon and concluded the present value and future forest production potential of the property had been seriously understated.

The County Forest Manager estimated the present volume of timber on the property is almost three times the volume estimated by petitioners' expert. He estimated the current value of the timber on the property as follows:

> "[I]f the volume is approximately 100 MBF or more, you have a total value of forest product of over $15,000 after logging cost. This is based on salvage sales as recent as 1990, competitive bid sales and would be considered average. Therefore, if you [were] to deduct the reforestation costs and the site preparation, not only on the area that could be

> harvested, but also [on] the area to be converted into forest land, you would still have in excess of $10,000 of profit." Record 288.

Dodd v. Hood River County, 22 Or. LUBA at 730-32.

After considering all this evidence, LUBA concluded that there was no taking under the Oregon Constitution:

> It appears that the property has some limitations for forest use, but can produce a net profit if properly managed for timber production. The limited value of the existing timber as well as the lesser value ascribed to the future timber production potential of the property by petitioners' expert appears to have as much to do with past deficiencies in forest management and limited forest management projected in the future, as with the inherent limitations of the property.

Id. at 732. In addition, it explicitly discounted the Dodds' arguments based on purchase price because the property's zoning status at the time the Dodds purchased it was suspect:

> At the time the property was purchased, the county had initiated proceedings to change the F-1 zone to include the requirement that dwellings be limited to those necessary for and accessory to forest use. The record shows petitioners' predecessors in interest received written notice of the proposed amendments to the F-1 zone prior to the time the property was sold to petitioners. As noted earlier, the property was not legally partitioned until after the F-1 zone was amended to include the necessary and accessory standard. In view of these circumstances, we conclude petitioners at the very least had constructive notice at the time the property was purchased that approval of a dwelling on the property might be denied under the necessary and accessory standard.

> Although petitioners may have failed to consider that uncertainty in purchasing the property for $33,000, they may not use that failure as a basis for claiming they have no substantial beneficial use of the property.

Id. at 732.

DISCUSSION

A. Standard for Summary Judgment

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. *United Steelworkers of Amer. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989).

B. Issue Preclusion

1. Issue Preclusion Applies in this Case to the Extent of Oregon Law

Plaintiffs argue that their reservation of federal claims pursuant to *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964), makes the doctrine of issue preclusion inapplicable to their taking claim in federal court. I first note that there is a considerable question as to whether the *England* rationale applies in the absence of a federal abstention, and there has been no such abstention here. Moreover, the only two circuits to have addressed the issue have determined that issue preclusion applies in cases where the plaintiff has reserved its federal claims from the state court proceeding, especially if there has been no federal court abstention pursuant to *Railroad*

Commission v. Pullman Co., 312 U.S. 496 (1941). *See Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178, 181-83 (2d Cir.), *cert. denied* 112 S.Ct. 193 (1991) (holding that plaintiffs' attempts to reserve their federal claims after a federal court abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1977), did not prevent the district court from applying collateral estoppel based on the district court proceeding because the purposes of such abstention differ from those of a *Pullamn* abstention); *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1073-74 (3d Cir. 1990) (holding that state court findings can be the basis of issue preclusion in reserved federal claims if the normal requirements for issue preclusion are met).

In addition, since *England*, the Supreme Court has upheld the application of issue preclusion to state law determinations, even if the plaintiff would have preferred not have been litigating in state court. "The federal courts generally have * * * consistently accorded preclusive effect to issues decided by state courts." *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153-54 (1979); *Angel v. Bullington*, 330 U.S. 183 (1947)). Issue preclusion expressly applies in § 1983 claims: "There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Allen v. McCurry*, 449 U.S. at 104.

Finally, federal statute requires that judicial proceedings in state courts "shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * ." 28 U.S.C. § 1738. This statute encompasses the issue preclusion bar. *See Haring v. Prosise*, 462 U.S. 306, 313-14 (1983) (applying Virginia law of collateral estoppel through 28 U.S.C. § 1738 to a § 1983 action). Therefore, issue preclusion will apply to the Dodds' federal

takings claim to the extent that it would apply in a new Oregon court proceeding.

2. Plaintiffs Are Precluded from Relitigating the Value of Their Property

Under Oregon law, issue preclusion bars "future litigation on a subject issue only if the issue was 'actually litigated and determined' in a setting where 'its determination was essential to' the final decision reached." *Drews v. EBI Companies*, 310 Or. 134, 139 (1990). "Issue preclusion applies to an issue of either fact or law." *Id.* at 140. Moreover, issue preclusion applies to administrative adjudications. *Id.* at 142. In a recent *en banc* decision, the Oregon Supreme Court determined that an administrative decision will preclude relitigation of the same issue if five conditions are met:

> 1. "The issue in the two proceedings is identical."
>
> "2. The issue was actually litigated and was essential to a final determination on the merits in the prior proceeding. * * *
>
> "3. The party to be precluded had a full and fair opportunity to be heard on that issue. * * *
>
> "4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding. * * *
>
> "5. The prior proceeding was the type of proceeding to which this court will give preclusive effect."

Fisher Broadcasting, Inc. v. Department of Revenue, 321 Or. 341, 347 (1994) (quoting *Nelson v. Emerald People's Utility Dist.*, 318 Or. 99, 103 (1993)).

Two factual issues are of potential importance to this court's evaluation of defendants' motion for summary judgment: the state of the zoning at the time the Dodds purchased their property, and the value remaining to the Dodds at the time Hood River County denied their permit, zoning and plan requests. I

conclude that LUBA's determination of the value issue precludes that issue's relitigation in federal court. Moreover, because this fact requires that I deny the Dodds their takings claim, I do not reach the issue of the status of the zoning at the time the Dodds purchased their property.

a. The Issue of What Value Remains Is Identical in State and Federal Law

Although the legal standards governing a taking under federal and state law are arguably different, the issues of fact to which the courts apply those standards are the same. Thus, under Oregon constitutional law, LUBA had to determine whether the Dodds retained some "substantial beneficial use" of their property. *Dodd v. Hood River County*, 22 Or. LUBA at 729. Under the federal standard for a regulatory taking, "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992). For either test, the underlying factual issue is identical: what is the value of the property after the regulation is in place?

b. The Dodds Actually Litigated Remaining Value Before LUBA

The Dodds actually litigated the issue of the remaining value of their property before LUBA, as was quoted above. The Dodds have complained that they did not get to cross-examine Kenneth Galloway, who submitted a letter to the Hood River County commission stating that the value remaining was approximately $10,000. However, in oral argument before this court, the Dodds admitted that they were able to establish all of their evidence refuting Mr. Galloway even without cross-examination. Moreover, LUBA's decision, as quoted above, shows that it considered the Dodd's evidence establishing a much lower value and simply found that evidence to be an inaccurate assessment of the profit possible from timber

production on the property. Instead, it concluded that "the property has some limitations for forest use, but can produce a net profit if properly managed for timber production." *Dodd v. Hood River County*, 22 Or. LUBA at 732. This determination, moreover, was essential to LUBA's conclusion that there had been no taking under the Oregon Constitution.

c. The Dodds Had a Full and Fair Opportunity to Be Heard Before LUBA

The Dodds also argue, through a due process claim, that the LUBA proceeding denied them a full and fair opportunity to be heard. They cite statutory constraints on LUBA's scope of review to support their argument. I find the Dodds' arguments unpersuasive and hold that they received a full and fair opportunity to be heard on the value of their property.

The Oregon Supreme Court has explicitly decided that regulatory taking claims are within LUBA's jurisdiction to decide. *Dunn v. City of Redmond*, 303 Or. 201, 209 (1987); *see also* ORS 197.835(9) (a) (E) (LUBA "shall reverse or remand the land use decision under review if [it] finds: (a) The local government or special district: * * * (E) Made an unconstitutional decision."). Review of local decisions is confined to the record ORS 197.835(2) (a), but when constitutional issues are alleged, "the board may take evidence and make findings of fact on those allegations." ORS 197.832(2) (b). LUBA's rules provide for full evidentiary hearings in constitutional cases, including subpoena power, presentation of witnesses, cross-examination, rebuttal, and presentation of exhibits. *See generally* OAR 661-10-045. In addition, LUBA's procedures allow the parties to fully brief their arguments, OAR 661-10-035, 661-10-038, 661-10-039, and to present oral arguments. OAR 661-10-040.

Statutes provide that LUBA is "to be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the ***whole*** record."

ORS 197.835(2) (b) (emphasis added). Both the Oregon Supreme Court and LUBA itself in the *Dodd* decision understand this provision to give LUBA an independent review of the local government's decision using a broader evidentiary base than was available at the local government level. *Dunn v. City of Redmond*, 303 Or. at 209 ("The special provision for taking evidence beyond the record made before the local government * * * shows that a full LUBA review of whatever may bear on the constitutionality of a land use decision was not beyond legislative contemplation."); *Dodd v. Hood River County*, 22 Or. LUBA at 725 (LUBA has an "independent obligation to consider petitioners' allegations concerning the constitutionality of the county's decision"). LUBA thus allowed the Dodds a full evidentiary hearing in which they could present new evidence of unconstitutionality. Moreover, LUBA's takings decision under the Oregon Constitution clearly indicates that it did not consider itself bound by the county's finding that the Dodds' property was worth $10,000; instead, LUBA thoroughly considered what the Dodds have now conceded was a full presentation of their rebuttal evidence. *Dodd v. Hood River County*, Or. LUBA at 730-32. Therefore, the Dodds had a full and fair opportunity to be heard on this issue.

d. The Dodds Were Parties to the LUBA Proceeding

This factor is not in issue. The Dodds themselves litigated before LUBA, and hence no issues of privity arise.

e. LUBA Proceedings Are Accorded Preclusive Effect

Under Oregon law, not all administrative proceedings receive preclusive effect.

> Whether an administrative decision has a preclusive effect depends on: (1) whether the administrative forum maintains procedures that are "sufficiently formal and comprehensive"; (2) whether the

> proceedings are "trustworthy"; (3) whether the application of issue preclusion would "facilitate prompt, orderly, and fair resolution"; and (4) whether the "same quality of proceedings and the opportunity to litigate is present in both proceedings."

Nelson v. Emerald People's Utility Dist., 318 Or. at 104 n.4 (quoting *State v. Ratliff*, 304 Or. 254, 258 (1987). However, the Oregon Court of Appeals has allowed an agency proceeding to have preclusive effect when it was "an adjudicatory proceeding in which the plaintiff had a full opportunity to litigate the issues presented." *Hickey v. Settlemer*, 116 Or. App. 436, 439, *rev'd on grounds of non-identity of issues*, 318 Or. 196 (1993). In *Hickey*, the court noted that plaintiff "was represented by counsel and was allowed to call and cross-examine witness. There is a transcript of the proceedings, there was a neutral factfinder and the final order was subject to judicial review. Plaintiff had an incentive to contest the issues, because his business license was at stake and substantial fines could have been imposed." *Id.*

I find the procedures available at LUBA substantially identical to those in *Hickey*. Moreover, the Oregon Court of Appeals has allowed the availability of LUBA procedures for inverse condemnation claims to have *res judicata* preclusive effect on later proceedings. *Springer v. City of Bend*, 111 Or. App. 136, 138 (1991), *reconsideration denied* (1992). Therefore, the Dodds' LUBA hearing is the type of adjudicatory proceeding entitled to have issue preclusive effect under Oregon law.

C. The Dodds Have Not Suffered a Regulatory Taking as a Matter of Law

The Dodds are now precluded from contesting LUBA's finding that they could make a profit from forest use of their land. Under federal takings law, mere diminution in the value

of property cannot constitute a taking. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978). The United States Supreme Court and the Ninth Circuit have denied takings claims for regulatory losses in value far greater than that the Dodds suffered here, from $33,000 to approximately $10,000. *See Village of Euclid, Ohio v. Ambler Reality*, 272 U.S. 365, 384 (1926) (finding no taking even though the landowner suffered a 75% diminution); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (finding no taking even though the value dropped from $800,000 to $60,000); *Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (finding no taking when the value dropped from $2,000,000 to $100,000). In *Lucas*, moreover, the Supreme Court acknowledged that diminutions of up to 95% of a property's value might not constitute a taking. *Lucas*, 112 S. Ct. at 2895 n.8. Therefore, the Dodds have suffered no taking as a matter of law and defendants are entitled to summary judgments.

IT IS SO ORDERED.

DATED this 11th day of December, 1996.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

Appendix C-1

Filed 6/24/92

THOMAS DODD and DORIS DODD,

Petitioners,

and

OREGONIANS IN ACTION,

Intervenor-Petitioner,

vs.

HOOD RIVER COUNTY,

Respondent,

and

OREGON DEPARTMENT OF FISH AND WILDLIFE, OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, OREGON DEPARTMENT OF FORESTRY, and 1000 FRIENDS OF OREGON,

Intervenors-Respondent.

LUBA No. 91-116

Appeal from Hood River County.

. . . .

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal the county's denial of their consolidated request for permits and zone and comprehensive plan map amendments to allow construction of a single family dwelling on their 40 acre parcel.

. . . .

Appendix C-2

RESERVATION OF CLAIMS PENDING IN FEDERAL COURT

A related action is pending in the federal District Court of the District of Oregon. Petitioners reserve their right to have their federal claims adjudicated in federal court and do not submit them for review by LUBA.

. . . .

10. The legal test for determining whether a land use regulation violates Article I, section 18, of the Oregon Constitution is set out in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 609, 581 P2d 50 (1978), as follows:

> ". . . Where a [land use regulation] allows a landowner some substantial beneficial use of his property, the landowner is not deprived of his property nor is his property 'taken.' . . ."

As noted earlier in this opinion, the factual and legal inquiry as to whether a landowner affected by restrictive land use regulations retains "some substantial beneficial use" is somewhat uncertain by virtue of the lack of Oregon appellate court cases explaining the meaning of the ultimate legal test and applying that test to particular factual situations.[12]

The Oregon Supreme Court cases cited by the court in *Fifth Avenue*, in adopting the "some substantial beneficial use" test, do not provide much assistance in determining at what ponit a land use regulation does not leave the property owner "some

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[12] Additionaly, *Fifth Avenue Corp. v. Washington Co., supra*, drew a distinction between situations where the government is seising title or possession of the affected property (its enterprise capacity) and where the government is imposing a regulation (its arbitral capacity). Following *Fifth Avenue Corp. v. Washington Co.*, the Oregon Supreme Court cases considering takings claims have all dealt with precondemnation actions rather that strictly regulatory takings claims such as is presented in this appeal.

substancial beneficial use."[13] However, in one of the Court of Appeals decisions cited by the court in *Fifth Aveneu, Joyce v. City of Portland*, 24 Or App 689, 546 P2d 1100 (1976), the plaintiff's allegations "that their property 'is not suitable or economically usable for agricultural purposes' and that 'the soil of the area cleared sufficient to be farmed is considered poor for agricultural purposes'" were taken to be a tacit admission "that their property can be beneficially used for agricultural purposes, albeit not as suitably or economically as it could have been used [for other purposes] before the zone change."[14] *Id.* at 692.

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[13] *Oregon Investment Co. v. Schrunk*, 242 Or 63, 71, 408 P2d 89 (1963) (denial of access to commercial parking lot from one street does not take such property for public use without compensation where the parking lot is accessible from other streets); *Morris v. City of Salem et al*, 179 Or 666, 673, 174 P2d 192 (1948) (installation of a city parking meter on private property does not constitute an unconstitutional taking); *Kroner v. City of Portland et al*, 116 Or 141, 151-52, 240 P 536 (1925) (application of a zoning district which prohibits construction of a creamery to property on which construction of a creamery had been proposed does not constitute a taking of such property).

[14] Although the court was not specifically addressing the meaning of "some substantial beneficial use" the following discussion in *Seuss Builders v. City of Beaverton*, 294 Or 254, 258-59, 656 P2d 306 (1982) suggests the Oregon Supreme Court does not believe the standard is violated simply because there may be a severe reduction in the value or use of affected property:

> "[Regulation] happens to many forms of business enterprise and private investment, not peculiarly to investment in real property, where it perhaps stirs special atavistic memories of the feudal and pioneering past. And land use control is not the only kind of regulation directed to specific identifiable property. The generality of a rule often safeguards against biased and unequal political decisions, but that alone does not turn a more narrowly

(continued...)

11. Intervenor-petitioner argues at length that we should construe the requirement of Article I, section 18 consistently with recent U.S. Supreme Court Fifth Amendment takings cases. We decline intervenor-petitioner's invitation in view of the Oregon Supreme Court's rejection of similar arguments in *Seuss Builders v. City of Beaverton, supra.*[15] In view of the Oregon

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[14] (...continued)

> focused ruling into a taking. A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant. A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety or access for handicapped persons may make it uneconomical to maintain a hotel or residential building, with consequent financial loss. Business invests with the knowledge of such governmental power to make laws for its conduct and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for 'just compensation.' . . ." (Footnote omitted.)

[15] In *Seuss Builders, supra*, 294 Or at 258, the Supreme Court stated:

"Petitioners and amici curiae invite us to reconsider *Fifth Avenue Corp. v. Washington Co., supra*, to pursue what they claim to be a more sophisticated analysis of 'regulatory takings.' We see no occasion to do so. . . ."

The Supreme Court went on to state the criteria of Article I, section 18 for a "compensable taking" are not necessarily the same as the Fifth Amendment. The Supreme Court pointed out that although the U.S. Supreme Court has applied the concept of "investment backed expectations" in discussing a Fifth Amendment takings claim in *Penn Central Transp. Co. v. City of New York, supra*, the Oregon Supreme Court has not considered investment backed expectations as an element to be considered in a regulatory taking claim under Article I, section 18. The court also questioned "whether such expectations

(continued...)

Supreme Court's explicit reservation of judgment concerning whether is will look to U.S. Supreme Court Fifth Amendment "takings" jurisprudence to further develop the appropriate test to be applied in considering Article I, section 18 takings claims, we do not believe it is appropriate for this Board to do so.

Turning to the facts in this case, petitioners' expert testified that 32% of the property (12.6 acres) includes Ketchly soils and is covered with Douglas fir. The existing stand of Douglas fir is forty to sixty years old, with some grand fir and ponderosa pine mixed in. The expert estimated the growth of this stand over the next two decades to be only 24 cubic feet per acre per year, a rate "generally considered to be less than necessary for commercial timber management." Record (Appendix 3) 59. He also identified 5.7 additional acres of thinner Ketchly soils, covered with Hazel Brush, that he concluded could not economically be reforested with commercially viable conifers. The expert went on to estimate the total current net value of the timber on the property at $691. Record (Appendix 3) 59-65.

A representative of the Oregon Department of Forestry disputed the conclusions of petitioners' expert.

> "[T]he Department finds that the management plan correctly identifies the soils, but information about the forest capability is inconsistent with our data. Information on Ketchly soils in the *Soil Conservation Survey of Hood River County* (1981), prepared by the United States Department of Agriculture, Soil Conservation Service, establishes that the Douglas fir 100 year site index is 100 . . . . This site index is for a fully-stocked *unmanaged* stand . . . . Such stands will produce a mean annual increment of approximately

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[15] (...continued)
should take account of governmental power to change the laws." *Seuss Builders*, *supra*, 294 Or at 259 n 5.

> 207 board feet per acre per year up to 90 years of age . . . . This approximates 80 cubic feet per acre per year productivity. Fully-stocked managed stands will likely produce additional volume.
>
> "It appears that the productivity figure of 24 cubic feet referenced in the report . . . was intended to quantify the productivity of the existing stand and not the productivity potential of the site . . . .
>
> "Therefore, the portion of the subject parcel containing Ketchly soils is suitable for forest management. As a case in point, forest management is currently being practiced on land adjacent to the east and south . . .. According to the SCS Soil Survey, this land also contains Ketchly soils some of which have greater constraints (due to steep slopes) than the Ketchly soils on the subject parcel . . . ." Record 282.

In addition, the County Forest Manager estimated that there are 24 acres of the property that could be used for forest production.[16] The County Forest Manager questioned a number of the assumptions petitioners' expert relied upon and concluded the present value and future forest production potential of the property had been seriously understated.

The County Forest Manager estimated the present volume of timber on the property is almost three times the volume estimated by petitioners' expert. He estimated the current value of the timber on the property as follows:

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[16] Petitioners complain that while their expert based his analysis partially on data obtained on-site, the evidence relied upon by the county did not include any consideration of particular on-site conditions. However, the record indicates the County Forest Manager based his estimates on a review of 'the area from aerial photographs, and the ground . . . ." Record 286-87.

> "[I]f the volume is approximately 100 MBF or more, you have a total value of forest product of over $15,000 after logging cost. This is based on small salvage sales as recent as 1990, competitive bid sales and would be considered average. Therefore, if you [were] to deduct the reforestation costs and the site preparation, not only on the area that could be harvested, but also [on] the area to be converted into forest land, you would still have in excess of $10,000 of profit." Record 288.

In response to the above testimony, petitioners argue that "$10,000 after 20 years work is no return at all on a $33,000 investment, let alone an economically viable one." Petition for Review 31.

12. We conclude, based on the above, that petitioners have not been denied a "substantial beneficial use of [their] property." It appears that the property has some limitations for forest use, but can produce a net profit if properly managed for timber production. The limited value of the existing timber as well as the lesser value ascribed to the future timber production potential of the property by petitioners' expert appears to have as much to do with past deficiencies in forest management and limited forest management projected in the future, as with the inherent limitations of the property.

13. Petitioners' arguments rely heavily on the purchase price of the property. We assign no particular significance to the purchase price of the property in this case. At the time the property was purchased, the county had initiated proceedings to change the F-1 zone to include the requirement that dwellings be limited to those necessary for and accessory to forest use. The record shows petitioners' predecessors in interest received written notice of the proposed amendments to the F-1 zone prior to the time the property was sold to petitioners. As noted earlier, the property was not legally partitioned until after the F-1 zone was amended to include the necessary and accessory standard. In view of these circumstances, we conclude petitioners at the very

least had constructive notice at the time the property was purchased that approval of a dwelling on the property might be denied under the necessary and accessory standard. Although petitioners may have failed to consider that uncertainty in purchasing the property for $33,000, they may not use that failure as a basis for claiming they have no substantial beneficial use of the property.[17]

Petitioners Dodd's seventh and eighth assignments of error and petitioner Oregonians in Action's first assignment of error are denied.

. . . .

The county's decision is affirmed.

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[17] Petitioners and respondents dispute whether the property is suitable for other uses allowable in the F-1 zone. Because we conclude petitioners' property retains "some substantial beneficial use" for timber production, we do not consider those arguments.

Appendix D-1

Filed 6/29/95

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS DODD; DORIS DODD,
Plaintiffs-Appellants,

v.

HOOD RIVER COUNTY,
Defendant-Appellee,

and

STATE OF OREGON,
Defendant-Intervenor-Appellee.

No. 93-35207

D.C. No.
CV-91-1157-JO

OPINION

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
September 14, 1994--Portland, Oregon

Filed June 29, 1995

Before: Ruggero J. Aldisert,* Thomas Tang and
David R. Thompson, Circuit Judges.

Opinion by Judge Aldisert; Dissent by Judge Tang

*Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

OPINION

ALDISERT, Circuit Judge.

This appeal requires us first to decide whether the district court erred in dismissing for lack of ripeness the Fifth Amendment taking claim brought by Appellants Thomas and Doris Dodd, owners of real estate in Hood River County, Oregon. If we conclude that the issue is now ripe for decision, we must then decide what contentions may now be met on the merits, and if so, whether we should meet the merits or permit the District Court to do so in the first instance. For the reasons set forth below, we affirm in part and vacate in part the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

In November 1983, the Dodds purchased 40 acres of land in a Forest Use Zone in Hood River County, Oregon for $33,000, intending to build a retirement home. Buyers of land in the Forest Use Zone at that time were on notice that the property was zoned exclusively for forest use, that the State had outlined mandatory goals for the management of forest use land, that the Oregon Land Use Board of Appeals ("LUBA") had issued an opinion binding Hood River County to adopt the restrictive zoning ordinance, and that the County was in the process of adopting that ordinance. The present ordinance prohibits construction of dwellings on land zoned for forest use unless the dwellings are "necessary and accessory to forest use." Hood River Co. Zoning Ord. § 5.10(1)(1).

Oregon maintains a comprehensive system of land use regulation that requires coordination between state and local government agencies. The State Land Conservation and Development Commission ("State Commission") adopts a framework of mandatory state-wide land use planning goals, and reviews for compliance with those goals the

comprehensive land use plans of local governments. Or. Rev. Stat. §§ 197.225 and 197.040(2)(d); *see Alexanderson v. Board of Comm'rs for Polk County*, 289 Or. 427, 436, *reh'g denied*, 290 Or. 137 (1980).

In 1975, the State Commission adopted Goal 4, which defined forest lands, detailed the permissible uses allowed on forest land and provided guidelines for planning and implementation.[1] In February 1983, LUBA interpreted Goal 4 as permitting the construction of dwellings in Forest Use Zones only if the buildings were "necessary and accessory to forest use." *Lamb v. Lane County*, 7 Or. LUBA 137, 143 (1983). Pursuant to the state schema of land use regulation, and prior to the Dodds' purchase of the property in November 1983, Hood River County initiated the process of adopting a new complying ordinance. The County published notices of the proposed changes, and informed affected land owners, including the Dodds' predecessor-in-interest.

No one gave actual notice to the Dodds that the County was considering changing the land use restrictions relative to the property. They received a report dated July 7, 1983 from the County Sanitarian stating that the parcel was suitable for a

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[1] Goal 4 provided in relevant part:

> Forest land shall be retained for the production of wood fibre and other forest uses. Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan * * *

Forest uses--are (1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock.

septic system. On January 24, 1984, an employee of the County Planning Department signed a Land Use Compatibility Statement stating that a proposed single-dwelling residence on the property was compatible with State-wide Land Use Planning Goals in existence at that time. On February 10, 1984, the County Sanitarian sent a letter to the Dodds stating their plan to build in two years "would appear to leave opportunity for the water supply system to be developed." However, the record demonstrates that no county official represented that the necessary building permits would be issued.

In December 1984, the County Board of Commissioners approved the ordinance requiring that forest dwellings be allowed in forest use zones only where "necessary and accessory" to forest use.[2] In January 1985, the State Commission acknowledged that Hood River County's ordinance was in compliance with the state's planning goals.

Some six years passed before the Dodds made their initial inquiry with the County Planning Department about the construction of a dwelling on their property. In 1990 they filed

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[2] The restrictions on forest use zoned land in Hood River County are set out in Article 5 of the County Zoning Ordinance. The purposes of that zone are stated as follows:

> The Forest (F-1) Zone is established to designate and reserve areas for the purpose of maintaining renewable forest resource production, retention of watershed productivity, recreation and other compatible uses.
>
> It is the purpose of this zone to discourage land use incompatible with the management and development of forest resources in order to maximize forest resource production and to minimize the possibilities of damage from fire, pollution and conflict caused by urbanization. It is further intended to retain sensitive land and water resources. Overall the zone is intended to meet the requirement of Goal # 4.

and were denied applications for land use permits, variances, zone changes and comprehensive plan changes. Pursuant to Section 72.40 of the Zoning Ordinance, the Dodds appealed to the County Planning Commission. After conducting public hearings on the Dodds' requests, the County Planning Commission upheld the Planning Director's decision in April 1991. Thereafter, the Dodds appealed to the Board of County Commissioners, which conducted a public hearing, considered the record before the Planning Commission, and in July 1991, upheld the Planning Commission's decision.

In August 1991, the Dodds filed a Notice of Intent to Appeal with LUBA, which under state law has exclusive jurisdiction to review land use decisions. Or. Rev. Stat. § 197.825. In their Petition for Review dated November 12, 1991, the Dodds contended that the County improperly construed the zoning requirements and issued a decision unsupported by substantial evidence. Pendent to these claims, the Dodds asserted a claim under the Oregon taking clause. Article I, Section 18 of the Oregon Constitution provides: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]" LUBA has subject matter jurisdiction over federal and state constitutional claims. Or. Rev. Stat. § 197.835(7)(a)(E); *see Dunn v. City of Redmond*, 303 Or. 201 (1987).

The Dodds did not pursue the taking claim under the Fifth Amendment of the United States Constitution at that time, making a specific reservation in their Petition for Review in which they "expressly reserve[d] their right to have their federal claims adjudicated in federal court."

LUBA affirmed the County's decisions, concluding: (1) the County interpreted and applied the "necessary and accessory" test in a manner consistent with that required by

Oregon's appellate courts; (2) the County did not err in finding that the Dodds' proposed dwelling was not "necessary and accessory" to forest use; and (3) because the timber on the property had a value of approximately $10,000, there was no denial of a substantial beneficial use of the property and thus, no regulatory taking under the Oregon taking clause. *Dodd v. Hood River County*, 22 Or. LUBA 711 (1992). The Dodds appealed the LUBA decision to the Oregon Court of Appeals.

The Court of Appeals affirmed, determining that there had been no taking under the Oregon Constitution and rejecting the Dodds' argument that the regulations did not advance a legitimate governmental interest because the County allowed existing residences to remain as nonconforming uses in a Forest Use Zone. *Dodd v. Hood River County*, 115 Or. App. 139, 143 (1992). The Dodds appealed to the Supreme Court of Oregon which, on July 22, 1993, also affirmed. *Dodd et al. v. Hood River County et al.*, 317 Or. 172 (1993).

Meanwhile, as the state proceeding was ongoing, the Dodds filed a complaint under 42 U.S.C. § 1983 on November 5, 1991 in federal district court against the County, asserting violations of substantive due process, equal protection and the federal taking clause of the United States Constitution as well as the Oregon taking clause. The State of Oregon intervened as a party defendant. In August 1992, the district court granted the parties' joint request for a stay pending the resolution of matters before the Oregon state court system.

In October 1992, the County and State moved for summary judgment. In January 1993, the district court heard and decided the motion at a time prior to the final decision of the Oregon Supreme Court. It dismissed as unripe the Dodds' Fifth Amendment taking claim, and entered summary judgment in favor of the County and State on all other counts. The

Oregon Supreme Court has now decided the appeal adversely to the Dodds.

We are to decide whether the Dodds were required to pursue other remedies or take other action in the state court system before seeking relief in the federal court. If no further action by them was required, we are to determine the effect of the state court actions on the Dodds' federal claim, and if the federal claim is still viable we must decide whether we or the district court should consider the claim in the first instance.

Jurisdiction was proper in the district court under 28 U.S.C. § 1343(a)(3). We have appellate jurisdiction under 28 U.S.C. § 1291. This appeal was timely filed under Rule 4(a), Federal Rules of Appellate Procedure. This court reviews de novo a district court's order of summary judgment. *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1456 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987). Ripeness is a question of law, also reviewed de novo. *Herrington v. County of Sonoma*, 857 F.2d 567, 568 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

The federal complaint alleges that the County and State deprived the Dodds' of federal constitutional protections by taking their property without just compensation in violation of the Fifth and Fourteenth Amendments. The Dodds contend the Hood River County zoning ordinance, as applied to their property, constitutes a taking. The district court dismissed the taking claim without prejudice on grounds of ripeness while the Dodds' appeal to the Oregon Supreme Court was pending. It dismissed because "[*Williamson County Regional Planning Comm'n v.] Hamilton Bank [of Johnson City*, 473 U.S. 172, (1985),] at least requires [the appeal to the Oregon Supreme Court] to be completed for plaintiffs' fifth amendment claim to be ripe." Opinion and Order at 5. Subsequent to the district court's dismissal without prejudice, the Oregon Supreme

Court decided the appeal, but the County and State continue to challenge the ripeness of the Dodds' Fifth Amendment claim.

II.

The decision in *Williamson County*, 473 U.S. 172 (1985), established two distinct requirements for taking claims under the rubric of ripeness:

> First, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186.
>
> Second, plaintiffs must have sought "compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195.

Both the final decision and compensation elements must be ripe before the claim is justiciable. We consider each in turn.

The final decision element is well-developed and easily applied here. Beginning with *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and *Hodel v. Virginia Surface Min. & Reclamation Ass'n. Inc.*, 452 U.S. 264 (1981), the Court has declined to rule on taking claims when it believed the property owner had not received a final and definitive decision from a land use regulatory body on development of the property at issue. In *Williamson County*, the taking claim was unripe because there remained the "potential for . . . administrative solutions." 473 U.S. at 187 (landowner failed to seek variances that could have allowed development). In applying the final decision requirement, we have emphasized that local decision-makers must be given the opportunity to review at least one reasonable development proposal before we will consider ripe an as-applied challenge to a land use regulation. *See, e.g., Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S. 943

(1991); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.), *modified*, 830 F.2d 968 (1987), *cert. denied*, 484 U.S. 1043 (1988). Finality also requires the local government to determine the type and intensity of development that land use regulations will allow on the subject property; this determination helps the court evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation. *See Herrington v. County of Sonoma*, 857 F.2d at 570; *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988). Thus, a landowner may need to submit modified development proposals that satisfy the local government's objections to the development as initially proposed. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986).

Here, the final decision requirement was met. The Dodds filed land use and conditional use permit applications, and petitioned for zone and comprehensive plan changes with the County. These applications were denied in succession by the Planning Director, the County Planning Commission, and the Board of County Commissioners. The State of Oregon reached a final and definitive position on the Dodds' applications and petitions.

III.

Once the appropriate state agency reaches a final decision, the second ripeness requirement of *Williamson County*, the compensation element, is triggered. A federal court lacks jurisdiction to consider an as-applied regulatory taking claim until a determination is reached that "just compensation" has been denied by the state:

> [B]ecause the Fifth Amendment proscribes taking *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the

> constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action.

473 U.S. at 194 n.13 (emphasis added). In *Williamson County*, the Court concluded that Hamilton Bank's taking claim was not ripe because the Bank failed to utilize available state procedures:

> Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances . . . [U]ntil it has utilized that procedure, its taking claim is premature.

Id. at 196-97. *See also Jama Const. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991) (Dismissed as unripe where plaintiff "did not seek compensation through California procedures before bringing its federal action."), *cert. denied*, 503 U.S. 919 (1992); *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988) (Because Montana recognizes inverse condemnation under the State Constitution, plaintiff must "pursue [that claim] before he can state a [federal] taking claim.").

Oregon argues that the Dodds' Fifth Amendment claim is unripe because they have yet to pursue compensation in state court under all available state procedures. It contends that available state procedures include an action brought under the Fifth Amendment federal taking clause.

We look first at the text of *Williamson County* to determine whether the Dodds must pursue a Fifth Amendment action in state court in order to ripen their claim. In dismissing the *Williamson County* plaintiffs' claims as unripe, the Supreme Court focused exclusively on Tennessee state law:

> The Tennessee state courts have interpreted § 29-16-123 to allow recovery through inverse condemnation where the

> "taking" is effected by restrictive zoning laws or development regulations. *See Davis v. Metropolitan Govt. of Nashville*, 620 S.W.2d 532, 533-534 (Tenn.App. 1981) [(available remedies under state law for inverse condemnation)]; *Speight v. Lockhart*, 524 S.W.2d 249 (Tenn.App. 1975) [(same)]. . . . [U]ntil it has utilized that procedure, its taking claim is premature.

Williamson County, 473 U.S. at 196-97. The Court made no reference to the pursuit of the Fifth Amendment claim in state court.

Similarly, on countless occasions we have assessed the ripeness of a federal taking claim without mentioning the need to pursue a federal taking action in state court; instead, we have looked exclusively to--and instructed litigants to pursue remedies under--state substantive law. For example, in *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402, 1408 n.3 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), we held that claims under the just compensation clause were not ripe "until available state compensation remedies had been exhausted. . . . [P]laintiffs can obtain compensation under state law, a remedy they have not taken advantage of." *See also Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) ("Compensation . . . available under California law"); *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 622 (9th Cir. 1992) ("state remedies"), *cert. denied*, --- U.S. ----, 114 S.Ct. 60 (1993); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988) (Plaintiff failed to "seek compensation under state law."); *Hoehne v. County of San Benito*, 870 F.2d 529, 531 (9th Cir. 1989) (same).[3]

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[3] It is also the prevailing view among other courts of appeals that a taking plaintiff is required to pursue remedies available under state

(continued...)

We, therefore, conclude that under the teachings of *Williamson County* and decisions of this court in the context of ripeness, the compensation element is satisfied if remedies available under state law have been pursued.

IV.

The foregoing discussion leads to our rejection of the notion that *Williamson County* stands for the proposition that in taking cases the federal forum can be used only to compensate for the inadequacies of state taking procedures. Support for that notion emanates from the following passage in *Williamson County*:

> [I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

473 U.S. at 195. We concede that the Court's language is ambiguous, and that from these words it can be argued that federal courts will not be hospitable to state taking claim until (1) the claimant has asserted a federal Just Compensation Clause claim in the state court and (2) has received either no

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[3] (...continued)
substantive law. *See, e.g., Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994) ("The dispositive issue in this case is . . . whether the plaintiffs had at their disposal an available state remedy, such as an inverse condemnation action . . ."); *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 308 (10th Cir. 1992) ("inverse condemnation suit available under Utah law"). *See also, Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992); *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992); *Villager Pond, Inc. v. Town of Darien*, 1995 WL 299931 at *5, (2nd Cir. May 17, 1995); *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 158 (6th Cir. 1992); *Biddison v. City of Chicago*, 921 F.2d 724, 727 (7th Cir. 1991).

compensation or an amount not deemed "just." We will not allow this one-sentence tail to wag the entire opinion dog.[4] In addition to our discussion in Part III, other reasons support the conclusion we reach today.

We deem it extremely significant that the Court characterized the compensation element as an issue of ripeness. The central concern of ripeness is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. 13A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532 at 126 (*citing Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580 (1985)). If an issue can be illuminated by the development of a better factual record, a challenge may be unripe. *See Pacific Legal Found. v. State Energy Resources Conservation and Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981), *aff'd on other grounds*, 461 U.S. 190 (1983); *Hoehne*, 870 F.2d at 532. The Fifth Amendment action is not more "developed" or "ripened" through presentation of the ultimate issue--the failure of a state to provide adequate compensation for a taking--to the state court. Indeed, such a requirement would not ripen the claim, rather it would extinguish the claim. *See Palomar Mobilehome Park v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993). Declining to hear a case on ripeness grounds is appropriate in situations where there is a reasonable prospect that the state courts may adjust state law to avoid or alter the constitutional question. 13A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532.1 at 126. But where deference rests instead "on the prospect that the state courts may entertain and

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[4] More elegantly put, in a paraphrase of Learned Hand, "we will not make a fortress out of the dictionary; but . . . remember that [judicial opinions] always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) *aff'd*, 326 U.S. 404 (1945).

decide the constitutional question, the issue of comity should be addressed directly without reliance on ripeness." *Id.*

Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result. The case law is clear that with the exception of federal habeas corpus review of state convictions under 28 U.S.C. § 2254, the determination of federal constitutional questions in state court systems may not be reviewed or repeated in the federal systems. The Court in *Allen v. McCurry*, 449 U.S. 90, 94, 104 (1980) said that "[t]he federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel," excepting only "a federal writ of habeas corpus, the purpose of which is not to redress civil injury but to release the applicant from unlawful physical confinement."

Another important consideration has been the direction of taking jurisprudence subsequent to *Williamson County*. Less than two years after the decision, the Court faced a kindred issue of state inverse condemnation and stated:

> We have recognized that a landowner is entitled to bring an action [in state court] in inverse condemnation as a result of "the self-executing character of the [federal] constitutional provision with respect to compensation . . ."
>
> [I]t has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself. [The claim] rested upon the Fifth Amendment. Statutory recognition [by the state] was not necessary.

> [I]n the event of a taking, the compensation remedy is required by the Constitution.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315-16 (1987) (citations omitted).

Moreover, subsequent to *Williamson County*, we and other courts of appeals routinely have held that state procedures are considered inadequate only when state law provides no post-deprivation remedy for a taking. *See Austin*, 840 F.2d at 681 (Hawaiian courts and legislature had neither accepted nor rejected inverse condemnation action under Article I, Section 20 of the Hawaiian Constitution); *Levald Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) ("the unavailability of state remedies is the functional equivalent of the denial of just compensation"), *cert. denied*, --- U.S. ---, 114 S.Ct. 924 (1994); *see also New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1493-94 (11th Cir.) ("Florida law . . . provided no post-deprivation remedy."), *cert. denied*, --- U.S. ---, 114 S.Ct. 439 (1993).

We acknowledge the Court's unwillingness to have the federal courts become a super appeals board for local zoning decisions. *See Hoehne*, 870 F.2d at 532 ("The Supreme Court has erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards."). We disagree, however, with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedures in the state.

V.

The State and County urge us to consider claim preclusion as an alternative ground to dismiss the Dodds' Fifth Amendment claim. They contend that, even if presentation of

the Fifth Amendment claim in state court is not a ripeness requirement, the prohibition against claim-splitting precludes subsequent litigation of that claim in federal court.

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that federal courts "give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, (1984). Oregon courts adhere to standard principles of claim and issue preclusion. *See Rennie v. Freeway Transp.*, 294 Or. 319 (1982).

Our analysis begins with the recognition that in the state proceedings, first before the state administrative agency and later before the state appellate courts, the Dodds expressly reserved the right to proceed in claims for violations of federal constitution protection in other litigation.

It is against this backdrop that we must analyze the general rule in claim preclusion jurisprudence that a plaintiff who has prosecuted one action against a defendant and obtained a valid final judgment is barred by res judicata from prosecuting another action against the same defendant where (a) the claim in the second action is one which is based on the same factual transaction that was at issue in the first; (b) the plaintiff seeks a remedy additional or alternative to the one sought earlier; and (c) the claim is of such a nature as could have been joined in the first action. *See* Or. Rev .Stat. § 43.130; *Van De Hey v. United States Nat'l Bank of Oregon*, 313 Or. 86 (1992). Underlying this standard is the need to strike a delicate balance between the interests of the defendant and of the courts in bringing litigation to a close and the interest of the plaintiff in the vindication of a just claim. *See Hanson v. Oregon Dept. of Revenue*, 294 Or. 23, 31 (1982).

We conclude that the Dodds' Fifth Amendment claims are not subject to the general prohibition against claim-splitting as

the result of certain recognized exceptions. First, consent or tacit agreement is clear justification for splitting a claim. *Restatement (Second) of Judgments* § 26(1)(a), and comment a (1982). Because a primary purpose of claim preclusion is to protect defendants from being harassed by repetitive actions based on the same claim, the rule need not be enforced where the State and County have implicitly consented to the splitting of the Dodds' claim under state and federal laws. *See Rennie*, 294 Or. at 329 n. 9, (*citing* 18 Charles A. Wright, Arthur C. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4415 at 124-125; *and* Annot., 40 A.L.R.3d 108 (1971)). We find implicit consent here. The County and State failed to object in a situation where they were defending two simultaneous actions; moreover, they made a joint request with the Dodds to stay the federal action until resolution of matters pending in the state court.

Second, we conclude that the Oregon courts reserved the issue for later determination. A court may be able to reserve part of a plaintiff's claim for subsequent litigation by expressly omitting any decision with regard to it in the first judgment. *Western Baptist Home Mission Bd. v. Griggs*, 248 Or. 204, 211 (1967); *Rennie*, 294 Or. at 330.

> It may appear in the course of an action that the plaintiff is splitting a claim, but that there are special reasons that justify his doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action.

Restatement (Second) of Judgments § 26(1)(b). We conclude that the Oregon courts sufficiently reserved this issue by repeatedly acknowledging that the Dodds' federal constitutional claims were not before them and were pending in the

federal district court. *See, e.g., Dodd*, 115 Or. App. at 142 n. 2 ("No federal constitutional contention is asserted here. Some of the parties are also parties to a pending related federal court action."); *Dodd*, 317 Or. at 175 n. 2 ("Petitioners claim to be reserving their right to have any claims that they might wish to make under the federal constitution determined in federal court. This case, therefore, presents only issues of Oregon Law.").

We thus decline to dismiss the Fifth Amendment claim on the basis of claim preclusion. Accordingly, we need not confront the Dodds' attempt to avert the pains of preclusion law through use of an *England* reservation, which typically is available to litigants that are in state court "involuntarily" as a result of *Pullman* abstention by the federal court. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); *see also Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

VI.

Although we decline to dismiss the Dodds' Fifth Amendment taking claim, we will not reach the merits of that claim for two important and independent reasons.

A.

First, although we were required to decide the question of claim preclusion in the context of our elaborate ripeness discussion in Parts II, III and IV, the question of issue preclusion is still very much in this case. The difference between the two concepts has been succinctly described by Justice Potter Stewart:

> The federal courts have traditionally adhered to the related doctrines of res judicata [claim preclusion] and collateral estoppel [issue preclusion]. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could

> have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

Allen v. McCurry, 449 U.S. at 94 (footnote and citations omitted).

An important question that is yet to be decided by any court is whether the decision of the Oregon Supreme Court in *Dodd et al. v. Hood River County et al.*, 317 Or. 172 (1993) on the taking questions presented by the Dodds under Article I, Section 18 of the Oregon Constitution was an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion. In its discussion, the Oregon court made reference to evidence contained in the record before it and suggested that "investment-backed expectations" are not part of an Article I, section 18 analysis, and implied that this analysis would be available under a Fifth amendment taking. Under the circumstances, we believe that the issue preclusion issue should first be presented to the district court because the development of a factual record may be necessary to illustrate the resemblances and the distinctions between claims brought under the Oregon and federal constitutions. It will be for the district court to decide in the first instance whether a factual predicate is necessary to decide the question of issue preclusion.

B.

Accordingly, we will not meet the merits of the Dodds' Fifth Amendment taking contention. The preliminary decision of the district court on remand will determine whether the

Dodds are entitled to have this question litigated. Even if this additional problem were not present in this case, we would have declined to address the federal taking contention.

As a general rule, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106 (1976). This is not a hard and fast rule:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Golden Gate Hotel Assoc. v. City and County of San Francisco, 18 F.3d 1482 (9th Cir. 1994) (quoting *Singleton v. Wulff*, 428 U.S. at 121).

Although the parties fully briefed the merits before the district court and, on appeal, have expressed a willingness for us to decide this issue, we will not consider the federal taking claim. The District Court's dismissal was grounded on its own lack of jurisdiction and was without prejudice. The State and County, having not filed a cross-appeal, may urge any ground that would result in an affirmance of the judgment below in their favor, but may not obtain from us relief more extensive than it received from the district court. *See* Wright & Miller, *Federal Practice and Procedure* § 3904 n. 7 at 198; *see also Langnes v. Green*, 282 U.S. 531, 538-39 (1931); *U.S. v. Norman*, 767 F.2d 454, 455 (8th Cir. 1985); *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1205-06 (3rd Cir. 1991). Thus, even if the question of issue

preclusion were not in this case, we would require the district court to address the merits in the first instance.

We conclude that the County "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," *Williamson County*, 473 U.S. at 191, and that the Dodds have "exhausted . . . available state compensation remedies." *Sinaloa Lake*, 882 F.2d at 1408. We remand for consideration in the first instance the merits of the issue preclusion contention; this is a necessary prelude to the possible consideration of the Dodds' Fifth Amendment taking claim.

VII.

The Dodds also appeal the district court's grant of summary judgment in favor of the County and State on the substantive due process claims. We affirm the decision of the district court, discerning no evidence in the record to support a claim of arbitrary and capricious government action.

"There is, of course, no federal Constitutional right to be free from changes in the land use laws." *Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290 (9th Cir. 1990), *cert. denied*, 501 U.S. 1251 (1991); *see also William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). To establish a violation of their right to substantive due process, the Dodds must prove that the County's actions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *see also Sinaloa Lake*, 882 F.2d at 1407. A substantive due process claim requires proof that the interference with property rights was irrational and arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Federal judicial interference with a local government zoning decision is proper only where the government body could have no legitimate reason for its

decision. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Herrington*, 834 F.2d at 1498 n. 7. There is no denial of substantive due process if the question as to whether the government acted arbitrarily or capriciously is "at least debatable." *Clover Leaf Creamery Co.*, 449 U.S. at 469.

There is no evidence to support the Dodds' claim that the County acted arbitrarily and capriciously by simultaneously adopting the zoning ordinance and reassuring the Dodds of their ability to build a home. Although the County sent several letters and reports to the Dodds recognizing their intention to build on the property and suggesting "compatibility" with then existing planning goals, this correspondence contained no false or misleading statements. Indeed, in the letter sent to the Dodds before they purchased the property, the County expressly warned that it should not be construed as a representation that the necessary building permits would be issued. Moreover, the County published notices of the proposed change and specifically notified the Dodds predecessor-in-interest. This evidence simply could not support the claim that the County acted irrationally.

Similarly, we are persuaded that the zoning ordinance was adopted and applied by the County in order to advance legitimate state interests. The purposes of forest use zoning, set forth in the margin at note 2, plainly are legitimate and, with the exception of "forest production," are unchallenged by the Dodds. LUBA concluded that the County adopted the "necessary and accessory" test to comply with State-wide Land Use Planning Goal 4. LUBA ruled that the County properly applied and interpreted the "necessary and accessory" test in accordance with state appellate court decisions. Moreover, LUBA ruled that the County did not err in finding that the Dodds' proposed dwelling was not "necessary and accessory to forest use." Because the issue of whether the County acted arbitrarily and without a legitimate and rational basis for its

decision is "at least debatable," summary judgment in favor of the County and State was appropriate.

Because of the paucity of evidence supporting the substantive due process claims, we need not address the issue of whether the Dodds claims are superseded by their taking claim(s). The district court properly entered summary judgment in favor of the County and State on the substantive due process claim.

VIII.

The judgement of the district court is AFFIRMED in part and VACATED in part, and the proceedings REMANDED in accordance with the foregoing.

TANG, Senior Circuit Judge, dissenting:

The majority opinion concludes that the Dodds' case is ripe. I conclude the case is not ripe because the Dodds have not utilized state proceedings to obtain the just compensation required by the Fifth and Fourteenth Amendments. Accordingly, I dissent.

I.

My disagreement with the majority opinion centers around the second ripeness requirement, that the Dodds "seek compensation through the procedures the State has provided for doing so." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). According to the Supreme Court, an unconstitutional taking consists of two components: taking of property and subsequent denial of just compensation. If a property owner receives just compensation through the process the government provides, the property owner does not have a taking claim. *Id.* at 194-95.

The Supreme Court in *Williamson County* did not state that claimants seeking just compensation from state or local governments need seek in state proceedings only the *remedies* provided by state law. Rather, the Court required claimants to utilize state "*procedures*" to obtain just compensation. *Id.* at 194. The procedure available to the claimant in *Williamson County* was an inverse condemnation suit, as provided by Tenn. Code Ann. § 29-16-123. 473 U.S. at 196-97.

Inverse condemnation suits do not provide only the just compensation required under state law. Rather, such suits are a method of obtaining the just compensation required by the Fifth and Fourteenth Amendments. "A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (internal quotation omitted). "Claims for just compensation are grounded in the Constitution itself." *Id.* The state procedure *Williamson County* references is the procedure necessary to raise a federal taking claim in state court. Thus, under *Williamson County*, a taking claimant must litigate the federal constitutional claim through the processes the state provides.

The Supreme Court also compared the process for making a claim against state or local governments to the process for making a claim against the federal government. A taking claim against the federal government is "premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491." *Williamson County*, 473 U.S. at 195 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-1020 (1984)). The Tucker Act grants the U.S. Claims Court "'jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution.'"

Monsanto, 467 U.S. at 1017 (citing 28 U.S.C. § 491).[1] Thus, a Tucker Act taking claim is a claim for the just compensation required by the Fifth Amendment. The Supreme Court indicated that the Tucker Act procedure is analogous to the state proceedings claimants must follow to obtain just compensation from state and local governments. *Williamson County*, 473 U.S. at 195. Therefore, claimants following state procedures, like those utilizing the procedure established under the Tucker Act, should raise the federal just compensation requirement.

The Ninth Circuit decisions applying the state procedure requirement of *Williamson County* are not inconsistent with this conclusion. The Ninth Circuit has regularly dismissed cases in which claimants did not seek compensation through inverse condemnation proceedings. *See, e.g., Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (affirming dismissal of taking claim because claimant had not yet pursued inverse condemnation provided by Montana law); *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989) (case was ripe because at the time the suit was filed, prior to *First English Church*, California did not have an inverse condemnation remedy for regulatory takings); *Jama Const. v. City of Los Angeles*, 938 F.2d 1045 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992) (affirming dismissal of case because, following *First English Church*, claimant had to seek compensation through procedures established by California law). These cases simply do not address the issue of whether claimants

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[1] The Tucker Act, 28 U.S.C. § 491, provides in relevant part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

following state proceedings must seek the federal just compensation remedy. *First English* explains that inverse condemnation is the process for obtaining the federal just compensation remedy.

II.

Admittedly, if a taking claimant is required to litigate the constitutional claim in state court, the claimant is then barred by res judicata, i.e. claim preclusion, from bringing a federal court action. The Court in *Williamson County* did not address the res judicata bar. However, the Supreme Court has explained that claimants are not always entitled to vindicate federal rights in federal court. For example, in *Allen v. McCurry*, 449 U.S. 90, 92 (1980), a criminal defendant moved to suppress evidence allegedly obtained in violation of the Fourth Amendment. The Court concluded collateral estoppel barred a subsequent § 1983 suit asserting the same Fourth Amendment violation. *Id.* at 105.

Portions of the Court's analysis in *Allen* are relevant to the question of access to federal court for taking claimants. The Constitution does not give "every person asserting a federal right . . . one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Allen*, 449 U.S. at 103. "There is . . . no reason to believe that Congress [through passage of § 1983] intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." *Id.* at 104.

One could argue that the claimant in *Allen* still had a choice of forum because he could have filed a § 1983 suit rather than requesting suppression of the evidence in his criminal trial. However, practically speaking, a criminal defendant is unlikely to give up the opportunity to suppress

damaging evidence in order to retain his right to file a damages suit in federal court. The criminal defendant, like the claimant asserting a taking action against a state, must litigate the federal issue in state court.

Allen also explains the point at which a litigant normally confined to state proceedings may obtain access to federal court. The collateral estoppel bar is inapplicable when the claimant did not have a "full and fair opportunity to litigate" the issue decided by the state court. *Id.* at 101. Thus, a claimant can file a federal suit to challenge the adequacy of state procedures.

Relying in part on *Allen*, the Third Circuit has concluded that application of New Jersey claim preclusion rules, which deprived takings claimants of the opportunity to litigate their federal claims in federal court, did not violate the Due Process Clause. *Peduto v. City of North Wildwood*, 878 F.2d 725, 726 (3rd Cir. 1989). The takings claimants in *Peduto* raised both state and federal takings claims in state court, because *Williamson County* required filing an inverse condemnation suit in state court and New Jersey civil procedures rules required raising the federal claim in state court, under the New Jersey "entire controversy" doctrine.[2] The Third Circuit concluded that the Due Process Clause had not been violated because the claimants had a "full and fair opportunity" to litigate their federal claims. *Peduto*, 878 F.2d at 728. Denial of a federal forum is not a denial of due process. *Id.* at 729.

Furthermore, the Ninth Circuit has expressly concluded that, although *Williamson County* requires takings litigants to present their takings claims to state court to ripen the claim,

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[2] Under the "entire controversy" doctrine, a party who has elected not to raise a related part of the controversy is barred from raising it in a subsequent proceeding. *Peduto*, 878 F.2d at 727 (citing *Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc.*, 523 A.2d 131, 135 (N.J. 1987)).

"this requirement does not prevent the doctrine of res judicata from barring subsequent federal action." *Palomar Mobile-home Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993). The only difference between *Palomar* and the present case is that Palomar did not expressly reserve its federal claim.

III.

As the majority points out, res judicata poses a problem even absent a requirement that claimants raise the federal just compensation claim in state court. Res judicata bars a second action based on the same facts when the claimant seeks an additional remedy and the claim could have been joined in the first action. *See* Or. Rev. Stat. § 43.130; *Van De Hey v. United States Nat'l Bank of Oregon*, 829 P.2d 695, 698 (Or. 1992).

In response to this problem, the Dodds claim that, during the state proceedings, they were entitled to expressly reserve their federal claims for federal court pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *England* reservation applies when a litigant files a suit in federal court and the federal court stays proceedings to allow the state courts to consider state law questions. In such a situation, the litigant can inform the state court that she reserves federal issues for federal court. *Id.* at 421. By doing so, the litigant avoids the bar of res judicata upon return to federal court.

Without addressing *England* reservation, the majority concludes that the Dodds reserved their federal claim because the county impliedly consented by failing to object to reservation,[3] and the state courts expressly acknowledged

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[3] This portion of the majority's analysis may be problematic because the issue of whether the federal court has jurisdiction is an

(continued...)

reservation. While this conclusion allows the Dodds to proceed in federal court, the majority skirts the issue of whether taking claimants can reserve their federal claim in order to avoid a res judicata bar when the government objects to reservation.

If a taking claimant in the Dodds' position attempts to make an *England* reservation, several problems arise. First, *England* reservation applies when a suit begins in federal court, but the Dodds' taking claim began in a state administrative process. Indeed, to satisfy the *Williamson County* ripeness requirements, the Dodds had to begin with state proceedings. Were this the only problem, we could consider whether the rationale behind *England* reservation justifies reservation of federal taking claims when the claimant begins with mandatory state proceedings.

However, a far more crucial problem exists with respect to reservation of a federal taking claim. Unlike the *England* situation in which a federal court abstains to allow a state court to address state law issues, a taking claim in state court "is not an issue of state law the resolution of which might avoid a federal ruling." Thomas E. Roberts, "Fifth Amendment Taking Claims in Federal Court," 24 *Urban Lawyer* 479 (1992). Rather, a taking claim in state court:

> is a federal law issue, the Fifth Amendment, that the state court must decide. The *England* rule exists to protect the purpose of *Pullman* abstention to avoid federal constitutional rulings, but [*Williamson County v.] Hamilton Bank*

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[3] (...continued)
independent inquiry. Generally, parties cannot through consent confer jurisdiction upon the federal courts. *See Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986).

> demands that a state court make a federal constitutional ruling.

Id.

As discussed above, state just compensation procedures are designed to address the federal constitutional question. Indeed, such procedures are required by the Constitution. *First English Church*, 482 U.S. at 315. Reserving the federal question is simply not possible.

IV.

Even if taking claimants are allowed to reserve their federal claims, the federal action will regularly be barred by collateral estoppel, i.e. issue preclusion. Indeed, the majority opinion remands to the district court for determination of whether issue preclusion bars the Dodds' claim. Just compensation requirements are likely to be similar under both federal and state law. In considering the Dodds' state law taking claim, the Oregon Supreme Court indicated that, while the takings claims under the Oregon and United States Constitutions are not identical, "the basic thrust [of the two constitutional provisions] is generally the same." *Dodd v. Hood River County*, 855 P.2d 608, 613 (1993) (quoting *Suess Builders Co. v. City of Beaverton*, 656 P.2d 306 (1992)). Furthermore, the Oregon Supreme Court considered, although it did not decide, whether courts applying the Oregon Constitution's taking clause must determine whether a regulation interferes with investment-based expectations. The Oregon Supreme Court obtained this standard from *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2895 n. 8 (1992), a United States Supreme Court case analyzing a taking under the Fifth and Fourteenth Amendments. The Oregon Supreme Court's discussion indicates that Oregon courts look to federal taking jurisprudence to determine the applicable standards under Oregon law.

V.

Although the majority expresses consternation about the "revolutionary concept and draconian result" of limiting takings claimants' access to federal court, the majority's attempt to keep the door to federal court propped open is largely illusory. In order to avoid the operation of a res judicata bar to federal court, the majority rejects the conclusion that, under *Williamson County*, taking claimants must raise their federal taking claim in state proceedings. The majority concludes that taking claimants need raise only their state taking claims in state court. The res judicata problem remains, however, because res judicata generally bars claims that could have been joined in a prior proceeding. The majority fails to address how claimants will avoid the res judicata bar absent the unique circumstance of consent by the opposing governmental party and by the state court to reservation of the federal claim. Finally, even if res judicata does not bar the federal claim, collateral estoppel generally will. The state proceedings usually will determine the federal takings issue.

VI.

I conclude the case is not ripe because the Dodds have not sought, through state proceedings, the just compensation required by the Fifth and Fourteenth Amendments. Normally, res judicata bars a federal claim that could have been brought in the course of state proceedings. However, the state court allowed the Dodds to reserve their federal claim. Therefore, rather than applying a res judicata bar, we should dismiss the federal action. The Dodds should be required to seek just compensation in state court.

For the foregoing reasons, I respectfully dissent.

Filed 4/2/98

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS DODD; DORIS DODD,	)	
	)	
Plaintiff-Appellants,	)	No. 97-35124
	)	
v.	)	D.C. No. CV-91-00157-JO
	)	
HOOD RIVER COUNTY;	)	
	)	ORDER
Defendant-Appellee,	)	
	)	
and	)	
	)	
STATE OF OREGON,	)	
	)	
Defendant-Intervenor-Appellee.	)	

Before: ALDISERT,* PREGERSON, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Pregerson and Trott have voted to reject the suggestion for rehearing en banc, and Judge Aldisert so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

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* The Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit, sitting by designation.

Appendix E-2

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

MOTION FILED
AUG 3 1998

(2)

No. 98-54

In The

Supreme Court of the United States

October Term, 1998

THOMAS DODD and DORIS DODD,

Petitioners,

v.

HOOD RIVER COUNTY, an Oregon municipal corporation, and the STATE OF OREGON, intervenor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF HANS HOECK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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No. 98-54

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THOMAS DODD and DORIS DODD,
Petitioners,

v.

HOOD RIVER COUNTY, an Oregon municipal corporation, and the STATE OF OREGON, intervenor,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF HANS HOECK IN SUPPORT OF PETITIONERS, TOM AND DORIS DODD

Hans Hoeck hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner has been obtained. The consent of the attorneys for respondents Hood River County and the State of Oregon was requested but was not granted.

The interest of Hans Hoeck in this case arises from the fact Mr. Hoeck has a legal dispute in which the same issue in the instant case is determinative of his ability to

pursue litigation in federal court. That issue, specifically, is whether denial of a state constitutional takings claim precludes litigating a federal constitutional takings claim in federal court.

Mr. Hoeck is a realtor and real estate developer in the City of Portland, Oregon. Until 1991, he was the owner and renovator of the Bridgeport Hotel in Portland. After the City of Portland demolished the hotel as a "dangerous building," he brought a pendant action against the City in the U.S. District Court, contending, *inter alia*, the city's demolition of his building violated the Takings Clause of Article I, section 18 of the Oregon Constitution by arbitrarily and unreasonably demolishing his building, taking his private property without just compensation. Disregarding Mr. Hoeck's argument, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. Thereafter, this Court denied his Petition for a Writ of Certiorari in No. 95-748.

Even though Mr. Hoeck has exhausted his remedies under the Oregon Constitution, the issue preclusion decision of the Ninth Circuit in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) has prevented him from seeking relief under the Fifth and Fourteenth Amendments in federal court. Thus, the Court's review of this decision is essential to resolving not only "the chaotic jumble of methodologies regarding how to apply the 'economically viable use' test," Pet., p.27, but also the question of whether "the district court correctly applied issue preclusion against the Dodds." Pet. App. A, p. A-19.

Respectfully submitted,

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July 31, 1998

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-54

THOMAS DODD and DORIS DODD,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF HANS HOECK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interests of *amicus* are set forth in the preceding motion for leave to file brief *amicus curiae* of Hans Hoeck.[1]

ARGUMENT

In the interests of judicial economy, *amicus* Hans Hoeck adopts by reference the statement of the case as presented in the brief filed by Petitioners Tom and Doris Dodd. Nevertheless, *amicus* will briefly present those aspects of the case that are pertinent to the arguments presented in this brief.

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[1] Counsel for Hans Hoeck authored this brief in whole and only Mr. Hoeck made a financial contribution to its preparation and submission.

INTRODUCTION AND STATEMENT OF THE CASE

After Hood River County had denied the Dodds' permit for a dwelling on their 40-acre parcel, the Oregon Land Use Board of Appeals (LUBA) affirmed that denial, rejecting the Dodds' claims the county's decision constituted a taking under the Oregon constitution. On appeal, LUBA's decision was upheld by the Oregon Supreme Court in *Dodd v. Hood River County*, 317 Or. 172, 855 P. 2d 608 (1993). At every step of this process, the Dodds reserved their federal claims for litigation in federal court by asserting a reservation of those claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The Dodds then filed a federal constitutional takings claim in the U.S. District Court for the District of Oregon. Although the district court dismissed their case due to ripeness, the Ninth Circuit reversed that decision and remanded the matter back to the district court to first address the issue of whether issue preclusion effect should be given to the decision of the Oregon Supreme Court. Pet. App. D, p. D-19 (hereinafter *Dodd I*).[1] The district court on remand then concluded that the decision of LUBA, which had been affirmed by the Oregon Supreme Court, precluded litigation of the Dodds' federal takings claim in federal court. Pet. App. B., p. B-16.

On appeal to the Ninth Circuit, that court , after considering and ruling on various takings factors the

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[1] *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

District Court did not discuss, finally concluded "The district court correctly applied issue preclusion against the Dodds . . .." Pet. App. A, p. A-19 (hereinafter *Dodd* II).[2]

The Ninth Circuit concluded that issue preclusion applied against the Dodds because they fully litigated before LUBA the question of whether they had been denied all substantial beneficial use of their property. Pet. App. A., p. A-7. The court agreed with the Oregon Supreme Court that the Dodds' investment-backed expectations were not reasonable, Pet. App. A, pp. A-17 - A-18, and thus they had not been deprived of all economically viable use of their property. Therefore, the Dodds had fully litigated in the state courts, and under the state constitution, a "necessary issue that is identical to an issue before the federal court," Pet. App. A, pp. A-12, even though that issue in federal court was brought solely under the federal Constitution.

This case squarely presents the question of whether property owners seeking just compensation in federal court under the Takings Clause of the Fifth Amendment, after having been forced by reason of ripeness to litigate state takings claims in state court, may be denied a federal forum for their federal takings claims due to issue preclusion.

Since this Court decided *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985), this question has arisen in several federal circuit courts of appeal across the nation. The decision effectively forces litigation of federal takings claims, in tandem with state takings

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[2] *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998).

claims, in state court.[3]

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT - WHERE A TAKINGS CLAIMANT FIRST LITIGATES A STATE LAW CLAIM TO COMPLY WITH THIS COURT'S DECISION IN *HAMILTON BANK*, MAY A SUBSEQUENT FEDERAL CLAIM IN FEDERAL COURT BE BARRED BY ISSUE PRECLUSION?

The precedent established by the decision below places litigants of takings claims at the sole mercy of state courts to decide the merits of federal takings issues, effectively denying such litigants a federal forum for federal constitutional issues. In no other area of constitutional jurisprudence are civil rights litigants compelled to bring their federal constitutional claims solely in state court. To construe ligation of state takings claims in state court, in

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[3] Arguably, both and federal and state takings claims also could be brought in tandem in federal court, with the state claim being pendant to the federal action. This methodology has been articulated by Mr. Kassouni, who notes that the Ninth Circuit suggested this procedure in both *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990) and *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989). Kassouni, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 29 Cal. W. L. Rev. 1, 44 n.266 (1992). Although this procedure could avoid application of the doctrine of res judicata, the federal claim still could be subject to issue preclusion, since the state claim must be addressed first to comply with ripeness.

compliance with the ripeness mandates of *Hamilton Bank*, as barring federal takings claims from federal court under issue preclusion[4] is to relegate such property rights claims "to the status of a poor relation" vis-a-vis the other rights guaranteed in the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The doctrine of ripeness of takings claims finds its origins in the command of the Fifth Amendment that "private property [shall not] be taken for public use without just compensation." This Court has held that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State . . .." *Hamilton Bank*, 473 U.S. at 195. Thus, "the State action . . . is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.* (footnote omitted).

The Ninth Circuit based its holding of issue preclusion on this Court's decisions in *Allen v. McCurry*, 449 U.S. 90 (1980) (federal courts follow traditional doctrines of res judicata and collateral estoppel) and *Parsons Steel v. First Ala. Bank*, 474 U.S. 518, 525 (1996) (Full Faith and Credit Act requires federal courts to give state court judgments the same preclusive effect as they

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[4] Mr. Kassouni defines this term: "Collateral estoppel means 'issue preclusion.' It bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." *See* Charles A. Wright, et al., *Federal Practice and Procedures* § 4402 (1981). Kassouni, 29 Cal. W. L. Rev. at 43 n.259.

would be given by that state court). Pet. App. A, p. A-6. Neither decision involved the Takings Clause of the Fifth Amendment.

The construction of these cases by the Ninth Circuit directly conflicts with this Court's decision in *England*, 375 U.S. at 421, where it was held that there is no requirement "that federal claims be actually litigated in the state courts." In light of the mandate of *Hamilton Bank* that takings claimants must first go to state court and litigate state compensation remedies there, it is the epitome of unfairness to construe *Parsons* and *Allen* in such a way as to prevent litigants from turning to federal court to fulfill the promise of *Hamilton Bank*, that they may there litigate their ripe federal takings claim. The decision of the court of appeals establishes a pernicious precedent.

A. The *Dodd II* decision holds that, even if state courts assent to an *England* reservation of a federal takings claim, issue preclusion precludes its litigation in federal court.

Mr. and Mrs. Dodd had expressly reserved their federal takings claims at every step of their state court litigation brought under the Oregon Constitution, asserting a reservation under *England*. Pet. App. D, pp. D-17 - D-18. When the Dodds first appealed to the Ninth Circuit in 1995 in *Dodd I*, both the county and State of Oregon argued that the Dodds must have asserted both their state and federal claims in state court in order for the federal claim to be ripe in the U.S. District Court. Circuit Judge Aldisert, sitting by designation, and writing for the majority, disagreed: "[T]o hold that a taking plaintiff must first present a Fifth

Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant." Pet. App. D, p. D-14. An important element of the court's decision was its recognition that "the Oregon courts sufficiently reserved this [federal] issue by repeatedly acknowledging that the Dodds' federal constitutional claims were not before them and were pending in the federal district court." Pet. App. D, pp. D-17 - D-18 (citation omitted).

Nonetheless, he went on to hold that litigation of the state claim in state court could have the effect of issue preclusion on subsequent Fifth Amendment litigation in federal court:

> An important question that is yet to be decided by any court is whether the decision of the Oregon Supreme Court in *Dodd et al. v. Hood River County et al.*, 317 Or. 172, 855 P.2d 608 (1993) on the taking questions presented by the Dodds under Article I, Section 18 of the Oregon Constitution was an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion.

Pet. App. D, p. D-19.

In the end, he remanded the case back to the District Court to consider "in the first instance the merits of the issue preclusion contention . . .." Pet. App. D, p. D-21.

U.S. District Judge Robert E. Jones, on remand, concluded that the Dodds had a full and fair opportunity to

litigate the value of their property before LUBA, and that LUBA proceeding is "entitled to have [issue] preclusive effect under Oregon law." Pet. App. B, p. B-16. Thus, he concluded "The Dodds Have Not Suffered a Regulatory Taking as a Matter of Law." *Id.*

Judge Aldisert, writing again for the panel of the Ninth Circuit, agreed: "[I]t was fair and efficient for the district court to decide the Dodds are precluded from litigating the issue: *Id.* at p. B-12 (citation omitted). He went on to state that the Dodds' reservation of their federal claim at LUBA in the state courts under *England* did not "prevent operation of the issue preclusion doctrine." *Id.*

B. The decision below, forcing Fifth Amendment takings claims into state court through issue preclusion, raises an important federal question that should be settled by this Court.

The Ninth Circuit's substantive holdings regarding the "deprivation of all economically viable use" test, and "reasonable investment backed expectations" raise critical questions under the Takings Clause of the Fifth Amendment. However, those holdings should not obscure the central question of issue preclusion in light of this Court's decision in *Hamilton Bank*.

The decision of the Ninth Circuit takes this Court's decision in *Hamilton Bank* and distorts it beyond all limits of fairness and justice. The decisions effectively construe the "just compensation" words of the Fifth Amendment to close the federal courthouse door to all federal taking claims against state and local governments. Mr. Kassouni, writing

in 1992, foresaw this likelihood:

> The United States Supreme Court might have known that its "exhaustion of state remedies" requirement would effectively close the federal courthouse doors to aggrieved property owners. While the Supreme Court has not yet overruled *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, [166 U.S. 226 (1897)] which made the Just Compensation Clause applicable to the states through the Fourteenth Amendment, the res judicata [or issue preclusion] effect of final state court judgments could do just that.

Kassouni, 29 Cal. W. L. Rev. at 43-44 (footnote omitted).

Mr. Hoeck respectfully urges this Court to grant the Dodds' Petition to address this vital question of Fifth Amendment jurisprudence and to make clear that its *Hamilton Bank* ripeness decision, and its *England* decision, require litigation of only state constitutional claims in state court, and state denial of those claims neither bars nor precludes, under *Parsons Steel* and *Allen,* subsequent Fifth Amendment takings claims in federal court.

II.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE FEDERAL COURTS REGARDING THE PRECLUSIVE EFFECT OF PRIOR STATE COURT ADJUDICATION OF STATE LAW TAKINGS CLAIMS IN STATE COURT

This case squarely presents the conflict and tension between the Full Faith and Credit Act, 28 U.S.C. § 1738, and the ripeness command of *Hamilton Bank* for asserting claims under Takings Clause of the Fifth Amendment. This Court has long established that issue preclusion applies against a Section 1983 claimant (42 U.S. C. § 1983). *Allen* , 449 U.S. at 103-104. Moreover, this Court also has long established that claim preclusion applies against a Section 1983 claimant. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984) (petitioner's state court judgment has same claim preclusive effect in federal court it would have in state court). *Parsons Steel*, 474 U.S. at 525. However, this Court has yet to address the matters of claim and issue preclusion as those doctrines apply to whether or how either claim or issue preclusion applies to the Takings Clause of the Fifth Amendment, in light of the ripeness command articulated by this Court in *Hamilton Bank*.

Federal circuit courts of appeal across the nation have construed the preclusive effect of state court litigation of state takings claims in two major ways. Three circuits have made decisions that recognize that neither claim nor issue preclusion consequences should follow if an *England* reservation of federal claims is asserted in state court. Only the Ninth Circuit clearly holds issue preclusion applies, based on this Court's decision in *Allen*, and disregarding *England*.

In 1992, the Court of Appeals for the Eleventh Circuit directly addressed "whether . . . Florida collateral estoppel and res judicata principles precluded the homeowners' federal law takings claim." *Fields v.*

Sarasota Manatee Airport Authority, 953 F.2d 1299, 1302 (11th Cir. 1992). Senior Circuit Judge Johnson, writing for a unanimous panel, concluded those principles did not. His analysis focussed on the "jurisdictional problem" posed by the seeming conflict between the Full Faith and Credit Act and this Court's decision in *Hamilton Bank*: "[T]he Williamson County Court failed to address the question whether the exhaustion of potential state remedies would also require plaintiffs with takings clause claims to litigate their federal takings clause claims in state court." *Id.* at 1303.

After recognizing that an *England* reservation "strictly speaking, is not applicable to a takings clause claim because a litigant cannot first file in federal district court," *Id.* at 1305, and distinguishing both *Allen* and *Migra*, he concluded the Eleventh Circuit had construed *England* broadly, and held:

> [W]ould-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are "involuntarily" in the state courts, and therefore qualify for the exception to generally applicable res judicata principles.

Id. at 1306.

Thus, where litigants are in state court involuntarily because of the ripeness mandate of *Hamilton Bank,* and make a type of *England* reservation of their federal takings claims, but their state takings claims are decided against them, they

may pursue their federal claims in federal court. Judge Johnson noted that "Despite the Supreme Court's recent emphasis on strictly enforcing section 1738's mandate to give state court proceedings full preclusive effect, the Court has never called into question the continuing validity of *England*." *Id.* at 1307 n.8 (citing *Migra*, 465 U.S. at 85 n.7).

Since the court at the outset was examining the applicability of "Florida collateral estoppel and res judicata principles," *Id.* at 1302, the court's conclusion about an England reservation necessarily must apply to both claim and issue preclusion.

In a 1976 decision, the Fifth Circuit squarely addressed the res judicata and collateral estoppel effects on a federal court proceeding of a prior state court action. *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976) (per curiam). Ms. Jennings had appealed her dismissal as a teacher to the school board, arguing that her dismissal was racially motivated. After her claim was rejected and she was dismissed, she appealed the board's decision in the Louisiana state courts. *Id.* at 1331. The state courts rejected her claims. Thereafter, Ms. Jennings brought an action in federal court under 42 U.S.C. § 1983, claiming deprivation of due process and racial bias. The district court dismissed her due process claim because of res judicata, and her racial bias claim because of collateral estoppel. The Fifth Circuit affirmed. *Id.* at 1332.

Although Ms Jennings argued she was forced to bring her constitutional claims in state court to comply with Louisiana statutes, the Fifth Circuit concluded she had

failed to preserve her federal constitutional claims in state court:

> Under *England v. Louisiana State Bd. of Medical Examiners*, 1964, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440, however, had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts.

531 F.2d at 1332 (citations omitted).

Since she had not done so, the court affirmed the dismissal of her case. Nonetheless, the Fifth Circuit appears to recognize that an *England* reservation of federal claims would preclude application of both claim and issue preclusion.

The Court of Appeals for the Tenth Circuit recently made a decision analogous to *Jennings* in *Wilkinson v. Pitkin County Bd. of County Com'rs.*, 142 F.3d 1319 (10th Cir. 1998) . In a case with multiple state and federal court proceedings, the plaintiff had raised, and then dismissed, a federal constitutional takings claim in state court. He did, however, argue under the Colorado Constitution that the county's rejection of his land development applications was an unconstitutional taking. The state district court dismissed that claim. *Id.* at 1321.

When the plaintiff turned to the federal district court, that court concluded that all of the claims raised there "were identical to claims made in the prior state court

litigation, and were barred by the doctrines of res judicata and collateral estopppel." *Id.* On appeal, the 10th Circuit agreed, rejecting the argument that *Hamilton Bank* prevented those doctrines from applying. Observing that no *England* type of reservation of claims had been made in state court, the court distinguished *Fields*, *Jennings* and the Ninth Circuit's decision in *Dodd I*:[5] "We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case." Id. at 1324. Thus, assertion of an *England* reservation would prevent application of both claim and issue preclusion.

Even with assertion of an *England* reservation in state court, the Ninth Circuit now has held in the two Dodd decisions, first that claim preclusion does not apply, and second that issue preclusion does apply. It concluded that claim preclusion did not apply, because the Oregon courts had reserved the federal takings issue rather than because an *England* reservation had been asserted. Pet. App. D, pp. D- 17 - D-18. Thereafter, it concluded that issue preclusion did apply, because the Dodds "fully litigated a necessary issue in the course of the state proceedings that is identical

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[5] The *Wilkinson* court also made an examination of issue and claim preclusion decisions of other federal circuit courts of appeal: *Palomar Mobilehome Park v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993) (requirement that takings claim be brought in state court before case will be ripe for adjudication did not prevent doctrine of res judicata from barring subsequent federal action); *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997) (failure of applicants to raise federal takings claim in state court will not prevent, by res judicata, subsequent litigation of federal takings claim in federal court) (citing *Dodd I*); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989).

to an issue before the federal court . . .." Pet. App. A, p. A-12 (citing *Allen*, 449 U.S. at 104 and *Clements v. Airport Auth.*, 69 F.3d 321, 330 (9th Cir. 1995) (issue preclusion does not apply unless issues were actually litigated and necessarily decided)).

These cases show a of opinion between the Fifth, Tenth and Eleventh circuit courts of appeal and the Ninth Circuit. All four circuits agree state court litigation of state compensation claims will not have claim preclusive effect on subsequent litigation of ripe federal takings claims in federal court, if an *England* type of reservation of federal claims is taken in state court. In the Fifth, Tenth and Eleventh circuits, it appears issue preclusion does not operate if an *England* reservation is taken in state court. Only the Ninth Circuit has concluded that issue preclusion may not be avoided, even if an *England* reservation was asserted. The conflict presented by these cases on this significant issue should be resolved by this Court.

CONCLUSION

In *Fields*, the court made an important finding - that takings claim litigants are in state court *involuntarily* by operation of the ripeness mandate of *Hamilton Bank*. *Fields*, 953 F.2d at 1304. They must litigate their state claims in state court before turning to the federal courts with federal claims. The *Fields* court also concluded that an *England* reservation could not appropriately be taken in a case that originates in state court - its procedures are based on commencement of litigation in federal court, where the

federal court stays the action to allow state issues to be decided in state court. *Id.*

This Court decided *England* in 1964, 25 years before it decided *Hamilton Bank*. *Hamilton Bank* envisions no such claim reservation. It is not the operation of *England* that commands takings claimants first into state court to ripen federal takings claims - it is the construction of the Fifth Amendment that compels state litigation, because "no constitutional violation occurs until just compensation has been denied [by the state]." *Hamilton Bank*, 473 U.S. at 194 n.13. In view of *England's* inapplicability to actions commencing in state court, as recognized by both the Eleventh Circuit and the Ninth Circuit, reliance on an *England* reservation seems inappropriate.

The Fields court notes that "the homeowners did not raise their Fourteenth and Fifth Amendment claims in their state court complaint. Neither the Florida trial court nor the Florida appellate court relied on federal takings cases to decide what the homeowners had to establish in order to show they were entitled to compensation for the taking." *Fields*, 953 F.2d at 1307 n.9. Those facts alone should be sufficient to preserve a federal claim for litigation in federal court. Thus, assertion of an *England* type of reservation should not be required to preserve the federal claim.

Mr. Hoeck respectfully urges this Court to grant the Petition and hold that litigating state takings claims in state court pursuant to *Hamilton Bank* preserves federal takings claims for subsequent litigation in federal court. Neither claim preclusion nor issue preclusion arises by virtue of that

state takings litigation, even if the state and federal constitutions have analogous wording, provided that no federal claims are raised in state court, and the state court decision does not base its decision on federal takings jurisprudence. This Court should grant the Petition to construe and extend the holding of *Hamilton Bank* accordingly.

Respectfully submitted:

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